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OF THE  
LAWS OF ENGLAND  
VOLUME XI

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ENCYCLOPÆDIA  
OF THE  
LAWS OF ENGLAND  
BEING A  
NEW ABRIDGMENT

BY THE  
*MOST EMINENT LEGAL AUTHORITIES*

UNDER THE GENERAL EDITORSHIP OF  
A. WOOD RENTON, M.A., LL.B.  
OF GRAY'S INN, AND OF THE OXFORD CIRCUIT, BARRISTER-AT-LAW

VOLUME XI  
*BANNER TO CHEQUE*

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Revised by their respective Authors as at  
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# ENCYCLOPÆDIA

## THE LAWS OF ENGLAND

**Banner.**—See ILLEGAL PRACTICES.

**Banneret: Knight Banneret.**—Knights banneret fall into two classes.

Knights banneret created on the field of battle under the royal standard, the sovereign or Prince of Wales being present. Such knights banneret took precedence immediately after judges of the High Court, and before the younger sons of viscounts and barons, and before baronets. The other class of bannerets comprise knights banneret, created such by the king's commanders on the field of battle, but not under the same circumstances as the knights banneret of the class first mentioned. Knights banneret of this class take precedence immediately after baronets.

A knight banneret as such is distinguished from a knight bachelor (see KNIGHTS BACHELOR). The word is said to have been derived from the fact that he had the right to carry a banner and not merely a pennon.

**Banns of Marriage.**—The Marriage Act, 1823, 4 Geo. iv. c. 76, contains the existing statutory requirements as to publication of banns before marriage in churches or chapels of the Church of England. By sec. 22, "if any persons . . . shall knowingly and wilfully intermarry according to the rites of the Church of England" without banns, licence, or registrar's certificate, "the marriages of such persons shall be null and void to all intents and purposes whatsoever." To render a marriage invalid under this section, both parties must be aware of the absence of the proper preliminary at the time of solemnisation (*Greaves v. Greaves*, 1872, L. R. 2 P. & D. 423).

Sec. 2. Banns shall be published in an audible manner, according to the form of words prescribed by the rubric, upon three several (not necessarily consecutive) Sundays preceding the solemnisation of marriage, "during the time of morning service, or of evening service (if there shall be no morning service upon the Sunday upon which such banns shall be so published), immediately after the second lesson." Publication on a holy day (not being a Sunday), though warranted by the rubric, and by Canon 62 of 1603, would not be sufficient to comply with the Statute. A vexed question has arisen as to

the proper time for publication in "morning service." The rubrics which alone have statutory force are those in the "book annexed" to the Caroline Act of Uniformity. In the marriage service, the direction is "in the time of divine service, immediately before the sentences for the offertory." In the communion office, "banns of matrimony" are directed to be published with other notices next after the Nicene Creed, but before the sermon, which forms no integral part of the communion office (*In re Robinson* [1897], 1 Ch. 85). The Oxford University Press, about 1809, altered both these directions to the form in which they now appear in modern prayer-books. This was done without authority, but with a view of bringing the rubric into supposed agreement with the then existing statutory provision (26 Geo. II. c. 33, s. 1). The opinion of Alderson, B., expressed *obiter* at *Nisi Prius* in *R. v. Benson*, Oxford Summer Assizes, 1856, was that the proper time of "morning service" is still in the communion office (see Phillimore, *Eccl. Law*, 2nd ed., i. 588). This construction has the advantage of reconciling the rubric and the statute. The object of publication being to give notice, it is reasonable to make it in the middle of the principal service of the day, when the greatest number of people will presumably be present.

Sec. 7. No clergyman is obliged to publish banns without seven days' notice in writing. See *Nicholson v. Squire*, 1809, 16 Ves. 259, as to the responsibility a clergyman may incur by not requiring notice.

Sec. 6. The churchwardens shall provide a proper register book of the banns, and the banns shall be published therefrom, and not from loose papers.

Where the parties dwell in divers parishes, the curate (*i.e.* incumbent) of one parish shall not solemnise matrimony betwixt them without certificate of the banns being thrice asked from the curate of the other parish (*Rubric*). For a common form of this certificate, see Blunt's *Book of Church Law*, p. 130.

Sec. 9. Banns are only in force three months after the last publication.

It is conceived that it is open to any person present in church, acting in good faith, to declare, in response to the invitation, any fact which such person *bona fide* believes, and has reasonable ground for believing, to be a cause or just (*i.e.* lawful) impediment why the parties should not be joined together in holy matrimony. The incumbent should inquire into the validity of any objection taken, and, if in doubt, apply to his bishop for directions before proceeding with the publication or solemnisation. By sec. 8, in the case of minors, a parent or guardian, declaring dissent to the marriage at the time of publication of banns, renders such publication void.

Publication of banns should be by the names (both prename and surname) by which the parties are generally known (*Wyatt v. Henry*, 1817, 2 Hag. Con. 215). But see *Fendall v. Goldsmith*, 1877, L. R. 2 P. D. 263, as to the true legal surname being sufficient, unless actually superseded by reputation.

It has never been decided in terms that an incumbent is punishable for refusing to publish banns. But it would seem that for not publishing, after due notice, the banns of a baptized and confirmed parishioner, he would be liable to ecclesiastical proceedings under the Church Discipline Act, 1840, 3 & 4 Vict. c. 86, though probably not to a criminal indictment for misdemeanour either at common law or under the Marriage Act (see *R. v. James*, 1850, 3 Car. & K. 167, 172). To sustain a civil action, it is conceived.

it would be necessary to show a malicious and unreasonable refusal, and actual temporal damage (see *Davis v. Black*, 1841, 1 Q. B. 900). In the case of a divorced person, the Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 57, s. 57, makes no express reference to banns. It could hardly be contended that they are covered by the words "to perform the marriage service," in sec. 58.

By the Marriage Registration Act, 1856, 19 & 20 Vict. c. 119, s. 8, it is provided that, when one of the parties dwells in Scotland, a certificate of proclamation of banns in Scotland, by the session clerk of the parish, shall be as valid and effectual in England as a registrar's certificate.

Banns are the normal preliminary to marriage both by canon law and by statute. But the bishop has a canonical power to voluntarily dispense with all or any of the three publications, a power recognised by 25 Hen. VIII. c. 21, and the Marriage Acts.

See LICENCE: MARRIAGE.

**Baptism.**—The Church of England recognises baptism as one of the two sacraments which are generally necessary to salvation.

The sacrament of baptism has always been the means of entrance into the Christian Church. The Prayer-Book contains three separate offices for baptism: the ministration of public baptism of infants, to be used in church; of private baptism of children in houses; and of baptism of such as are of riper age and able to answer for themselves.

Article 27 provides that the baptism of young children is in anywise to be maintained in the Church, as most agreeable to the institution of Christ.

The Church of England contemplates immersion as the usual course in baptism; but if the godparents shall certify that the child is weak, it shall suffice to pour water upon it. The words used by the officiating priest in performing the rite are: "N. [naming the child after the name given by the godparents], I baptize thee in the name of the Father and the Son and the Holy Ghost."

The rubric provides that at public baptism the priest shall make a cross upon the child's forehead, the meaning of which is explained in Canon 30 of 1603. In case the child is first privately baptized, "it is expedient that it be brought to the church," that, if it has been properly baptized, "it may be received as one of the true flock of Christian people," but that, if it cannot appear that the child was baptized with water in the name of the Father and of the Son and of the Holy Ghost (which are essential parts of baptism), it may be conditionally rebaptized, as directed by the last rubric in the ministration of private baptism of children in houses.

The rubrics provide:

The people are to be admonished that it is most convenient that baptism should not be administered but upon Sundays and holy days; that there shall be, for every male child baptized, two godfathers and one godmother, and for every female, one godfather and two godmothers. When there are children to be baptized, the parents shall give knowledge thereof over-night, or in the morning, before the beginning of morning prayers, to the curate.

Canon 29 of 1603 provides that no person shall be "admitted to answer as a godfather for his own child. Neither shall any person be admitted godfather, or godmother to any child at christening or confirma-

tion before the said person so undertaking hath received the holy communion." This canon was repealed, as to province of Canterbury, by the Convocation of Canterbury, by a canon of 1869, passed under royal licence, but which has not been ratified by the Crown.

By a constitution of Thomas Peckham, Archbishop of Canterbury, priests shall take care not to permit wanton names to be given to children baptized, especially of the female sex; and if otherwise it be done, the same shall be changed by the bishops at confirmation (as to which, see CHRISTIAN NAME; CONFIRMATION) (Lind. 246).

In case a child shall have been registered without a name, or with a name different to that given it in baptism, the Births and Deaths Registration Act, 1874, 37 & 38 Vict. c. 88, provides for the registration of the baptismal name of such child within twelve months after birth.

As to lay baptism, a question was at one time raised whether the Church of England recognises a baptism performed by a layman. The doctrine and law on the subject may be summarised as follows: There is no question but that the practice obtained to a considerable extent in the primitive Church, and that from the beginning of the fifth century it was universally recognised in the Eastern and Western Churches that baptism by a lay person with water, in the proper form, was a valid baptism. By the older canon law, the administration of the rite of baptism was confined to priests, but in cases of necessity laymen and women (even pagans and heretics) might perform the ceremony (Lind. *Prov.* 50). The provincial constitutions of the thirteenth or the fourteenth century contemplate baptism by laymen and women in cases of necessity, and direct that the lay folk should be instructed by their priests as to the proper form in which to baptize. The rubrics of the first and second Prayer-Books of Edward VI. also recognise lay baptism, though as a practice not to be adopted "without great cause and necessity." The rubric to the office for the private baptism of infants, published after the Hampton Court Conference, 1603, however, provides: "And also they (the curates) shall warn the people that without great cause and necessity they procure not their children to be baptized at home in their houses. And when great need shall compel them so to do, then baptism shall be administered in this fashion: First, let the lawful minister and them that be present call on God for His grace; and then the child, being named by someone that is present, the said lawful minister should dip it in the water, or pour water upon it." The Rubric of 1661 substitutes for lawful minister, "minister of the parish, or other lawful minister that can be procured" (see rubric in the Prayer-Book). It was maintained, especially after the commencement of the eighteenth century, that the effect of this rubric was to make a baptism not performed by a lawful minister, null and void. Bishop Fleetwood (*Works*, p. 536) denies, however, that lay baptism is forbidden by any of the offices or rubrics; and Bingham (*Scholastical History of Lay Baptism*; *Works*, p. 572), speaking of the "present sense" of the Church of England, says: "She forbids laymen or women by her laws to baptize; but if it be done in due form, she does not wholly disannul, or order it to be repeated, as absolutely null and void." In *Kemp v. Wickes*, 1809, 3 Phillim. 265, and in *Mastin v. Escott*, 1841, 2 Curt. p. 692, and 4 Moo. P. C., it was held that a child properly baptized by a Dissenting minister (who is not a lawful minister according to the rubric), was validly baptized. It is therefore submitted that there can be no question that the Church of England, while discouraging lay baptism, does not treat it as void.

The Canon 69 of 1603 provides, that in the event of a minister

wilfully refusing or neglecting to baptize a child, and if the infant dieth, through such fault, unbaptized, he shall be suspended for three months, and before restitution shall acknowledge his fault, and promise before his ordinary not to incur it again. "Where there is a curate or substitute, this constitution shall not extend to the parson or vicar himself, but to the curate or substitute present."

As to the doctrine of baptismal regeneration; in *Gorham v. The Bishop of Exeter*, 1850, Moo. Special Report, the Privy Council held that the doctrine held by Mr. Gorham on the subject of baptism was not so contrary to the doctrines of the Church of England as to justify the bishop in refusing to institute him to a living; but they did not decide whether these opinions were sound, nor whether, upon some of the doctrines in question, opposite opinions might not be held with equal or greater justice by ministers of the Church of England. The doctrine of Mr. Gorham, as stated in the judgment of the Privy Council (Moo. p. 462), was: "That baptism is a sacrament generally necessary to salvation, but that the grace of regeneration does not so necessarily accompany the act of baptism that regeneration invariably takes place in baptism; that the grace may be granted before, in, or after baptism; that baptism is an effectual sign of grace by which God works invisibly in us, but only in such as worthily receive it: in them alone it has a wholesome effect; and that without reference to the qualification of the recipient, it is not in itself an effectual sign of grace: that infants baptized and dying before actual sin are certainly saved; but that in no case is regeneration in baptism unconditional."

Sir Walter Phillimore observes (*Ecclesiastical Law*, 2nd ed., vol. ii. p. 496) that this case will not support the view, that it is competent for a clergyman of the Church of England to hold nakedly, and without qualification, that infants are not regenerated by the sacrament of baptism. As to fees for baptism, ecclesiastical law has always prohibited the demand of money on account of any sacrament, the only exception being that the practice of the pious may create a custom whereby a fee is payable (Lind. 278); but such a fee can never be demanded except by custom, and then only by a minister who has performed the duty (*Burdeaux v. Lancaster*, 1697, 1 Salk. 332). The Act 35 & 36 Vict. c. 36, provides: "That from and after the passing of this Act it shall not be lawful for the minister, clerk in orders, parish clerk, vestry clerk, warden, or any other person, to demand any fee or reward for the celebration of the sacrament of baptism, or for the registry thereof; provided always that this Act shall not apply to the present holder of any office who may at the present time be entitled by any Act of Parliament to demand such fees."

As to registrations of baptism, see REGISTER; PARISH REGISTER.

[*Authorities.*—Phillimore, *Ecclesiastical Law*; Rogers, *Ecclesiastical Law*; Lindwood, *Provinciale*; *Book of Common-Prayer*; Bingham's works.] See also CHRISTIAN NAME; GODPARENT; CONFIRMATION; FONTS.

**Baptist.**—See NONCONFORMIST.

**Bar** (formerly "BARRE" or "BARR").—Originally the bar or rail (often in local Courts in old times a mere pole) which in Superior Courts of Record separated the members and officers of the Court from the criminals brought before it, and from the suitors, their advocates, and the general

## BAR

public. Such "bars" to this day exist in the Houses of Parliament, and are there still used for similar purposes to the above. The bar in the House of Commons yet remains literally a bar, although concealed from view when not in use. Bars, in a somewhat modified form, will be found, on close examination, in the Royal Courts of Justice in London, where there is a distinct division of each Court into two parts, the judges, serjeants (now rarely seen, as the order is disappearing), the Queen's counsel, those holding patents of precedence, and the officers of the Court (amongst them solicitors) sitting upon the inner side of this division, while the public remain outside it as in ancient times. It has long been the practice to allow such parties in civil suits as appear in person, to stand on the floor within the bar, instead of requiring them (as in very old times) to plead their causes at the bar itself. Criminals, however, still stand forward at the bar to take their trials, and, indeed down to 1774, they were obliged, when acquitted, to submit to have extorted from them a fee to the Sheriff, which had from time out of mind, under such circumstances, always been paid under the name of a "*bar fee*." But "bar fees" were then abolished (see 14 Geo. III. c. 50; also 8 & 9 Vict. c. 114). The Court has always had power to direct a *trial at bar* of any case of more than usual importance, to take place at its bar, before its full bench of judges. See BAR, TRIAL AT.

Advocates, as representing the suitor or criminal whose case the Court is trying, used always to stand at the bar, by the client's side, and there plead his cause. From this last fact the phrase "the bar" has obtained a secondary signification, and is used to describe those who practise the profession of advocacy, just as the expression "the church" is used to signify those who devote themselves to performing services in a church, and as the term "medicine" is employed to denote those who study and practise the proper administration of medicines. From the same fact, too, we get the word "barrister" (formerly barrastor). Persons desiring to practise as advocates at the bar must become members of one of the Inns of Court, and, after a prescribed interval, get themselves "called to the bar" by its rulers. There are four Inns, namely, Lincoln's Inn, the two societies of the Temple (the Middle and Inner Temples), and Gray's Inn. None of these Inns have precedence over any other, and in James I.'s patent to the two Temple societies (when the question was a burning one), two persons of high station from each house were named, at its commencement, in alternate order, and immediately after the mention of these four, the alternate order was reversed, and carried throughout the rest of the patent. The Inns are all voluntary societies, to which the judges of the various Courts (to whom, in strictness, the right would probably belong) have for centuries delegated power to "call to the bar," and to "disbar," subject to an appeal, in either case, to themselves as "visitors" against any injustice which may be alleged to be committed in the exercise of these powers. "Visitors" of each Inn are the Lord Chancellor and the common law judges. The Inns being voluntary societies, proceedings by action or other legal process (such as mandamus, etc.) will not lie against them. In old days, however, the judges used frequently to actively exercise their powers as "visitors" to, as such, issue directions to any Inn of Court they pleased; *e.g.* on Francis North being made "Q.C." (then an unusual rank), the Middle Temple benchers having refused to recognise his precedence, the judges ordered them to do so, and threatened to refuse them audience "until they had done justice to Mr. North." Generally, the judges sent separate copies of the same order to each of the four Inns, such orders often being subdivided into "articles." Such orders were sent to the four Inns in 1557, 1574, 1614, 1627, and

1630. The Inns, however, claim that these orders were mere recommendations, and were not binding as orders until adopted by their respective governing bodies. Orders are never now sent by the judges to the Inns, as, about the middle of the nineteenth century, the four Inns, guided probably by their having agreed on a common resolution as to deposits so early as 1795, occasionally united in framing "Consolidated Regulations" for their common government. Each Inn is now governed by these "Consolidated Regulations," and by orders as to domestic details from time to time made by its own governing body. The members of this governing body are called "Benchers" or "Masters" in all the Inns, and its meetings "Parliaments," "Bond Tables" at the Inner Temple, and, in Gray's Inn "Pensions." A person seeking admission to an Inn of Court must obtain an "Admission Form" (fee one guinea) from the treasury of the Inn which he desires to join; two barristers must certify to his respectability upon this form; the form must be also signed as approved by the treasurer (*i.e.* chairman of the benchers for the year) of such Inn. After obtaining his admission paper, the intended student must pass the preliminary examination established by the four Inns of Court under their "Consolidated Regulations," and conducted by a Board of Examiners appointed by them jointly. He will be provided with a certificate of having passed this preliminary examination, on production of which he will be formally admitted to the selected Inn. The fees on admission, which all include £25 for stamps, are: At Lincoln's Inn, £40; at the Middle Temple, £40, 6s. 3d.; at the Inner Temple, £40, 11s. (which includes the £5, 5s. for lecture fee); and at Gray's Inn, £39, 13s. 6d., with a further £5, 5s. for lecture fees. In addition, the student must, on admission (small variations as to this exist at each Inn; members of universities being, too, allowed relaxations at all the Inns, and at Lincoln's Inn and at the Middle Temple relaxations being allowed to members of the Scotch Bar), also make a cash deposit of (varying at the different Inns) £100, and give his personal bond for a like sum, collaterally secured either by a bond given by two sureties, or, at Gray's Inn, by one surety who is a householder, or at the Inner Temple, by a deposit of a further £50 cash in lieu of sureties. After admission, the student must "keep Terms," by dining three times if a member of the university, or six times if not, during each of the yearly four legal "Terms" in his Inn's Hall. The original reason for requiring this was to secure his attendance at the moots, exercises, and lectures, which actually were held after dinner; and to this day the hall door is locked from the time grace is said. The dining fees vary slightly at each Inn, but the average is about 22s. per term. Keeping sufficient "Terms" renders the student eligible for call, provided he has attended certain lectures, and passed the examination mentioned presently. Keeping twelve Terms is usually required; but not more than two may be dispensed with under special circumstances, or if a student obtain honours in the Call Examination. The Call Examination is in law, and conducted by examiners appointed by the Council of Legal Education, established under the "Consolidated Regulations." To get called, the student must obtain a bencher of his Inn, to whom he has been personally introduced, to sign a form (obtainable at his Inn), and also sign it himself. After this signed form has been deposited at his Inn, the bencher proposes the student for call at a "Parliament" or "Pension." If there approved, the student attends, on the sixteenth day of Term, at his Inn's Hall, and is formally "called" to the bar. The fees on call, which in all cases include the stamp duty, are: At Gray's Inn, £89, 2s. 4d.; at Lincoln's Inn, £94;



at the Inner Temple, £94, 10s.; at the Middle Temple, £99, 10s. Irish barristers on call to the English Bar only pay £10 for stamp duty, or in all £40 less, as, having previously paid full stamp duty, they are exempt from again paying the whole £50 stamp duty. The morning after his call, the newly made barrister attends in the Queen's Bench Division, and signs its roll. No more fees are now payable subsequently to call; but the barrister can, whenever he pleases, dine in hall, at a cost varying from 2s. to 3s. per dinner, and remains subject to his Inn's domestic and disciplinary powers, which latter may even be exercised to "disbar" him, if he be convicted of crime or be guilty of any gross professional misconduct. His call *ipso facto* entitles a barrister to vote for members of the Bar Council, a voluntary body consisting of elected barristers, and supported by funds (£600 a year) contributed by all the four Inns. The Bar Council came into existence in 1883 as the Bar Committee, which was founded at the instance of the present writer and a few friends, the chief of whom was Mr. Hedderwick, M.P.; but in 1894 the name was changed to that of "The Bar Council,"—some alterations were made in its constitution,—and contributions to its support were obtained from the four Inns. The Bar Council "is the representative of the bar, and its duty is to deal with all matters affecting the profession, and to take such action thereon as may be deemed expedient." The Bar Council possesses no disciplinary powers, but, in conjunction with the Attorney-General and the benchers of the four Inns, watches the professional etiquette of the bar, and draws the benchers' attention to any gross violation of it. The three principal bar rules of etiquette are: (1) That fees are divided between a leader (who ought to be a Q.C., a serjeant, or a barrister, with a patent of precedence) and a junior in the proportion of three-fifths to the former and two-fifths to the latter; (2) that no barrister accepts business upon a "Circuit" to which he does not belong, except for a special fee; (3) that all litigious business must come through a solicitor, though a barrister may advise a client, directly and personally, as to *non-litigious* matters (such as making his will, or a settlement of his property). A barrister's fee, like that of a physician, is an *honorarium*. It cannot be recovered by legal process; and, on the other hand, a barrister is not liable to an action for negligence. See ADVOCATE.

**Bar Council or Bar Committee.**—See BAR.

**Bar Fee.**—See BAR.

**Bar, Plea in.**—Under the old common law system of pleading, pleas were divided into two main classes—1. *Defatory pleas*, including pleas in abatement (see ABATEMENT; ABATEMENT, PLEAS IN), and pleas to the jurisdiction, which are sometimes but improperly described as pleas in abatement (Archb. *Cr. Pl.*, 21st ed., 141; Chit. *Prec. Pl.*, 7th ed., 1868, pp. 280–287; *Companhia de Moçambique v. British South Africa Co.* [1893], App. Cas. 602). 2. *Pleas in bar or peremptory pleas*, averring facts, which, if supported by evidence, form a conclusive and substantial answer to the indictment or action, by barring the remedy, and not merely defeating, suspending, or delaying the particular proceeding in which it is claimed.

*Civil Proceedings.*—In civil proceedings pleas in bar could be pleaded to every form of real or personal action. They fell into two classes—(a) pleas by way of *traverse* or denial, which denied the allegations on which the plaintiff's right of action was based; (b) pleas by way of *confession and avoidance*, admitting the plaintiff's allegations, but setting up other facts, which, if true, wholly defeated his action. The common law system was considerably altered by *Regulæ Generales* of Hil. Term, 1833, and under the Common Law Procedure Acts, and was swept away by the Judicature Acts and Rules, except in the Mayor's Court of London, and as to the general issue or plea of not guilty by statute, which was abolished as to civil proceedings by the Public Authorities Protection Act, 1893, 56 & 57 Vict. c. 61. See DEFENCE; PLEADING.

[For authorities on the old system, see 3 Chit. *Pl.*, 7th ed., 24 *et seq.*; Bullen and Leake, *Proc. Pl.*, 3rd ed.; Chit. *Proc. Pl.*, 3rd ed., 1868, 287.]

*Criminal Proceedings.*—The common law practice as to pleading in bar remains in force as to criminal proceedings. The pleas in bar there in use are—(1) The general plea or general issue, which traverses all the material averments on indictment or information. This plea is now pleaded orally by the answer "not guilty" on arraignment (7 & 8 Geo. IV. c. 28, s. 1; Archb. *Cr. Pl.*, 21st ed., 156).

In criminal proceedings in the Queen's Bench Division the plea of not guilty is put in in writing in the Crown Office, except in cases of felony (C. O. R., 1886, rr. 128–133; Short and Mellor, *Cr. Off. Pr.* 192–194).

(2) Special pleas in bar which in practice are required to be put in in writing on parchment. Of these the most usual are (a) AUTREFOIS ACQUIT (*q.v.*), and (b) AUTREFOIS CONVICT (*q.v.*).

(c) The special plea of AUTREFOIS ATTAINT (*q.v.*) is obsolete, and

(d) That of PARDON is rarely used. See PARDON.

(e) On indictments for non-repair of highways, where the liability to repair is alleged to fall on a person or district other than that indicted, a special plea in bar is required (Archb. *Cr. Pl.*, 21st ed., 147; and see HIGHWAYS).

(f) Special pleas of justification in libel. See JUSTIFICATION.

(g) Pleas to the jurisdiction, which merely object that the indictment is laid with a wrong venue or before the wrong Court, seem to be dilatory only. It is a moot point whether a plea to the jurisdiction denying the competence of any English Court should not be treated as a plea in bar. Such an objection is usually taken under the general issue or by motion to quash the indictment (*R. v. Jameson* [1896], 2 Q. B. 425).

(h) A plea of insanity was a plea in bar; but since the Trial of Lunatics Act, 1883, 46 & 47 Vict. c. 38, stands in a different position (see Wood Renton on *Lunacy*, 1896, 807–812).

[For further authorities as to pleas in bar in criminal cases, see Archb. *Cr. Pl.*, 21st ed., 147–158; 1 Chit. *Cr. Pl.*, 451; 1 Russ. on *Crimes*, 6th ed., 38–50.]

\* **Bar, Trial at.**—A trial at bar was formerly a trial before all the judges of one of the Superior Courts sitting in *banc* (*q.v.*) at Westminster. Prior to the Statute of Westminster 2 (13 Edw. I. c. 10, repealed by 44 & 45 Vict. c. 59) all causes in the Courts of King's Bench and Common Pleas, with the exception of some minor ones which were disposed of before justices in Eyre, were so tried. That statute substituted the trial at Nisi Prius for all ordinary causes, and the trial at bar was left only for such

matters "the which require great examination." The Act did not bind the Crown, and neither criminal cases nor civil actions to which the Crown was a party could be sent down for trial at *Nisi Prius* without the consent of the Attorney-General.

After the Act it became a matter of course to award a writ of *Nisi Prius* in every case, unless either the Crown was a party concerned, and refused its assent, or the Court in its discretion thought fit to direct a trial at bar, a direction which might more properly have been called a direction that there should be no award of *Nisi Prius* (*R. v. Castro*, 1874, L. R. 9 Q. B. 350).

The Judicature Acts have not had the effect of abolishing trial at bar even in civil matters, although no mention is made of this mode of trial either in the Acts themselves or in the rules made under them, so far as they relate to civil procedure (*Anderson v. Gorrie*, 1894, 10 T. L. R. 383; *Dixon v. Farrar*, 1886, 18 Q. B. D. 45). The provision for the trial of civil issues before two or more judges (which may take place anywhere) is a different thing (*Dixon v. Farrar*, *supra*). But in criminal cases the grant of a trial at bar is specially provided for by the Crown Office Rules of 1886.

The only instance of a trial at bar in a civil case since the Judicature Acts came into force is the case of the *A.-G. v. Bradlaugh*, 1885, 14 Q. B. D. 667, but that was upon an information by the Attorney-General to recover penalties, and was not an ordinary civil action.

A trial at bar now takes place before a Divisional Court, which may be constituted of two or more judges (App. Jurisdiction Act, 1876, 39 & 40 Vict. c. 59, s. 17; Judicature Act, 1884, 47 & 48 Vict. c. 61, s. 4). In the only two cases which have occurred since the Judicature Acts came into force three judges sat (*A.-G. v. Bradlaugh*, *supra*, and *R. v. Jameson*, 1896, 12 T. L. R. 551; [1896], 2 Q. B. 425). Only in this respect and in the fact that the trial takes place at the Royal Courts of Justice in London before a jury brought from the county where the venue is laid, does the trial at bar differ from other trials in the High Court. It can only be had in cases of very great public importance, and is of rare occurrence, for the Court has always been very reluctant to grant a trial at bar unless there is real necessity (*Chit. Crim. Law*, 497).

The Crown has a right by virtue of its prerogative to try its cause at bar (1579, Sav. 2; Cro. (3), 1633, 348), a right which extends to all cases even when the litigation is between subjects and the Crown is interested or has any right to interfere (*Dixon v. Farrer*, 1886, 18 Q. B. D. 45; see also *R. v. Hales*, 1728, 2 Stra. 816; *Sir Samuel Astrey's case*, 1703, 2 Salk. 651; 6 Mod. 123).

It has been held that it has no right so to interfere where the prosecution of an indictment was being conducted by a private prosecutor (*Anon.*, 1670, 1 Vent. 74).

And even upon an information filed by the Attorney-General *ex officio*, a trial at bar was refused because he did not allege that the prosecution was carried on at the expense of the Crown (*R. v. Hales*, 1728, 2 Stra. 816).

Although the Attorney-General was never bound to consent to a trial at *Nisi Prius* when the Crown was concerned, yet he could not prevent a trial at bar when the Court considered that it was reasonable to try it there (*Sir Samuel Astrey's case*, *supra*).

To the subject it is entirely in the discretion of the Court to grant or refuse it (*R. v. Carmarthen Burgesses*, 1753, Say. 79), but the Courts have always been very reluctant to grant it unless there was a real necessity (*Chit.*

*Crim. Law*, 407). At one time it was considered a sufficient ground if one of the parties was a judge or an officer of one of the Superior Courts (*Morton v. Hopkins*, 1669, 1 Sid. 407; *Sir Samuel Astrey's case*, 1703, Salk. 651), or even a member of the bar (*Sir Samuel Astrey's case*, *supra*); but in later times it was refused when the Lord Chancellor was the defendant and a solicitor was the plaintiff (*Dimes v. Lord Cottenham*, 1850, 5 Ex. Rep. 311; 19 L. J. Ex. 290); and since the Judicature Acts it has been refused in a case where the defendants were Colonial judges (*Anderson v. Gorrie*, *ubi supra*).

In that case it was pointed out that though the jurisdiction to grant a trial at bar in civil actions still remains, it was a jurisdiction which ought not to be lightly exercised, and was much modified by reason of the changes brought about by the Judicature Acts, such as there being now an appeal in civil matters to the Court of Appeal of the fullest kind on all grounds of law or fact, and the application for a trial at bar was refused because the case did not present any feature of extreme importance or extreme difficulty. The first-mentioned reason of course does not apply in criminal cases.

It being in the discretion of the Court to grant or refuse a trial at bar, it follows that the Court may, as a condition of granting it, impose such terms as they may think fit (*Homes v. Brown*, 1780, Doug. K. B. 420; *Lord Sandwich's case*, 1698, 2 Salk. 648; and see C. O. R. 162).

When the Court sat at Westminster a trial at bar could not be had where the venue was laid in the city of London, because the citizens were exempt by their charter from serving as jurors out of their city (*Anon.*, 1694, 2 Salk. 644; *Bambridge v. Castell and Another*, 1729, 2 Stra. 856). And for the same reason it was doubtful if it could be had where the venue was laid in a County Palatine (*Gally v. Clegg*, 1752, Say. 47; *R. v. Amery*, 1786, 1 T. R.; 1 R. R. 306, 366), or other exempt jurisdiction, such as Bristol (2 Lil. Abr. 750).

But such a trial was actually had in a city of London case, the jury consenting and waiving their privilege (*Lockyer v. East India Company*, 1761, 2 Wils. 136); and in a Crown prosecution arising out of the riots at Bristol the venue was changed by consent from the city of Bristol to the county of Berks, and the case was tried at bar at Westminster before a jury from that county (*R. v. Pinney and Others*, 1832, St. Tri. N. S. vol. iii. 17).

It has been granted even to a person who sued *in formâ pauperis* (*Sherwin v. Clarges*, 1698, 12 Mod. 318); but refused when moved for by the defendant because the plaintiff was poor (*Lord Sandwich's case*, *supra*).

It used to be a rule not to grant a trial at bar until after issue joined (*Lomax v. Holden*, 1732, 2 Barn. K. B. 125; *Cantillon v. Lord Montgomery*, 1730, Fitz-G. 267; *R. v. Amery*, 1786, 1 T. R. 364 n.; *Christchurch case*, 1725, 2 Stra. 696), except in cases of ejectment (*Anon.*, 1754, Say. 155), because until then the Court could not well judge whether the issue would be a matter of difficulty or not (*Borough of Christchurch case*, *supra*); but in the case of *R. v. Jameson*, 29 June 1896, the order was made before any plea was entered.

In criminal cases the practice with reference to a trial at bar upon the Crown side of the Court is regulated by the Crown Office Rules, 1886. It cannot be had except by order of the Court (C. O. R. 160), to obtain which an application must be made to a Divisional Court of the Queen's Bench Division. If made by the Attorney-General on behalf of the Crown the order is made absolute in the first instance as of course (C. O. R. 160).

but if at the instance of the subject the application must be by motion for an order *nisi* (*ibid.*), supported by an affidavit showing very sufficient and strong grounds, such as extreme difficulty or extreme public importance, as above stated. The particular difficulty should be pointed out, as it is not sufficient to say generally that the cause is expected to be a difficult one (*R. v. Carmarthen Burgesses*, 1753, Say. 79).

If the prosecution be upon an indictment found elsewhere than in the Queen's Bench Division, it must first be removed thither.

The order will not be made absolute on the mere consent of the parties (*Borough of Christchurch* case, 1725, 2 Stra. 696); and on making it absolute, as it is entirely in the discretion of the Court to do, such terms may be imposed on the applicant, as to payment of costs or otherwise, as the Court may think fit (C. O. R. 162; and see *Holmes v. Brown*, 1780, 2 Doug. K. B. 437). If the order be made absolute, it must be drawn up at the Crown Office and served upon the other side. When the case is ripe for trial, it must be entered at the Crown Office for hearing, and a day must be fixed for that purpose by application to a Divisional Court, if it has not already been fixed by the order for the trial at bar. A ten days' notice of trial, as in other cases on the Crown side, must then be given. The notice may be countermanded, by leave of the Court or a judge, with or without terms (C. O. R. 154). But in such case it would seem that there should be a new order for trial at bar (*Cantillon v. Lord Montgomery*, 1730, Fitz-G. 267).

The jury is almost invariably special, and is usually struck under the old practice, as provided for by the Crown Office Rules (C. O. R. 158; the mode of obtaining a jury under the old practice is described in Short and Mellor's *Crown Office Practice*, p. 213). It may be summoned, from the county in which the offence was committed, or from any other county not exempt by law, at any time after issue joined (C. O. R. 163; and see *R. v. Pinney*, 1832, St. Tri. vol. iii. col. 17 *n* (d); *Dixon v. Farrer*, 1886, 17 Q. B. D. 667, 18 Q. B. D. 43). If the offence was committed in a jurisdiction where the jurors are exempted from serving outside, by their charter or otherwise, the venue must be changed to a county from whence they may be brought, otherwise it would be a reason, as previously shown, for refusing a trial at bar. In the case of the Bristol Riots in 1832, the venue was changed from the city and county of Bristol to the county of Berks (*R. v. Pinney*, *supra*; and see *Peirse v. Lord Fauconberg*, 1757, 1 Burr. 292; *Denn v. Lord Cadogan*, 1757, 1 Burr. 273). The jury may be summoned by an order of Court, to be obtained at the Crown Office as of course, without motion in Court (C. O. R. 252). Such order must be lodged with the proper sheriff in sufficient time to allow of the jury being summoned six days before the trial (C. O. R. 163).

The applicant for the trial at bar must deliver at the Crown Office, four days before the day fixed for the trial, three copies of the roll upon which the trial is to take place, for the use of the judges at the trial (C. O. R. 164). These copies consist of copies of the record as far as the award of the jury, but it is not necessary that the roll itself should be carried in.

The trial, as above shown, takes place before a Divisional Court of the Queen's Bench Division at the Royal Courts of Justice, or wherever the Court may sit, and the jury, from wherever summoned, must attend at their peril (see *Denn v. Lord Cadogan*, *supra*).

If a sufficient number of jurors do not attend, the trial must be postponed, and a further number summoned (*Denn v. Lord Cadogan*, *supra*).

A *tales* cannot be prayed under the Statute 6 Geo. IV. c. 50, s. 37, as the Act does not apply to trials at bar.

The trial may be continued *de die in diem* or adjourned to a subsequent day at any time in the discretion of the Court, without reference to the sittings of the High Court, without drawing up any formal order for the purpose (C. O. R. 165). Formerly such a trial could only be had in term, which necessitated the passing of an Act to remedy the inconvenience and difficulty (1 Will. IV. c. 70, s. 1, now repealed by 42 & 43 Vict. c. 59); but sec. 26 of the Jud. Act, 1873, now provides, subject to Rules of Court, for the sitting of the High Court and the judges thereof at any time and place.

The Queen's Coroner and Attorney, otherwise known as the Master of the Crown Office, assisted by one of the clerks from the Crown Office, attends the trial, calls the jury, administers the oaths, marks and reads the documents produced in evidence, records the verdict, and draws up the judgment. The senior judge sums up the evidence, but each of the presiding judges has a right to direct the jury separately (see the trial of the *Seven Bishops*, 1688, 12 How. St. Tr. 478); and the senior puisne judge usually passes the sentence when a verdict of guilty has been returned; but in the recent case of *R. v. Jameson*, July 1896, this order was departed from, and the Lord Chief Justice passed the sentence.

In criminal cases there is no appeal to the Court of Appeal, save for some error of law apparent upon the record (Jud. Act, 1873, s. 47), by writ of error; nor can a case be stated for the consideration of the Court for Crown Cases Reserved under 11 & 12 Vict. c. 78; but an application may be made, after conviction, to the Divisional Court for a new trial, whether upon the ground that the verdict was against the weight of evidence, or of misdirection, or with regard to the reception of evidence; or a motion may be made in arrest of judgment, as in other cases (*A.-G. v. Bradlaugh*, 1885, 14 Q. B. D. 667; *Bright v. Eynon*, 1757, 1 Burr. 395; *R. v. Bewdly, its Bailiffs, etc.*, 1712, 1 P. Wms. 270).

Although the Crown Office Rules above referred to do not specifically apply to civil actions nor to proceedings on the Revenue side of the Queen's Bench Division, and though no rules have been made under the Jud. Acts in relation to such matters, when once a trial at bar has been awarded, either for the trial of a civil action or of an issue on the Revenue side, the trial is proceeded with in much the same manner as in a criminal case; but the application for the trial at bar must be made on a notice of motion to the other side (*Anderson v. Gorrie*, 1894, 10 T. L. R. 383), and not, as in criminal cases, for an order *nisi*. When a date has been fixed for the trial, notice of trial should be given as in other cases; and should the notice of trial be countermanded, a new order for trial at bar must be obtained (*supra*). In the case of civil actions in the Queen's Bench Division, the cause must be entered with one of the Masters at the Court Order Department, and copies of the issue should also be left there four days before the date fixed.

The action is tried before a jury of the county where the venue is laid (see *Peirse v. Lord Fauconberg*, 1757, 1 Burr. 292; *Holmes v. Brown*, 1780, 2 Doug. 437; and R. C. C., Order 36, r. 1, as to place of trial in general); and, as in criminal cases, and for the same reason, no tales can be prayed in the event of there being an insufficient number of jurymen (*vide supra*). One of the Masters on the civil side, assisted by clerks from the Court Order Department of the Associates' Department, attends, and acts as officer of the Court; but if the cause be one on the Revenue side of the Court, the Queen's Remembrancer (*q.v.*), assisted by clerks from the Queen's Remembrancer's Department, attends for that purpose; in which latter case, in addition to the respective pleadings delivered between the parties, each party must file a copy of his pleadings at the Queen's Remembrancer's Department.

for the purpose of being enrolled, and the trial takes place on the roll (Revenue Rules, 22nd June 1860, r. 130).

A new trial may be moved for in the same manner as in a civil action, and an appeal lies in like manner to the Court of Appeal (*Attorney-General v. Bradlaugh, supra*).

**Barbados.**—An island in the West Indies, which has been a British possession since the seventeenth century. It was at first under proprietary government; in 1662 it was annexed to the Crown; in 1885 it was separated from the Windward Islands, and became a distinct government. The laws of the island are English in their origin. The Legislature consists of the Governor, a Legislative Council appointed by the Crown, and a Legislative Assembly elected under a local Act passed in 1891. The chief judicial authorities are the Chief Justice and the judges of the Assistant Court of Appeals. As to conditions of appeal to Privy Council, see PRIVY COUNCIL.

**Barbed Wire.**—An occupier of land who uses barbed wire for fencing may render himself liable for damage resulting therefrom, either to the occupier of, or to a person lawfully using, the adjoining land. His liability to an adjoining occupier rests on the principle embodied in the well-known maxim, *sic utere tuo ut alienum non lœdas* (cp. *Firth v. Bowling Iron Co.*, 1878, 3 C. P. D. 254). He is not liable to a mere trespasser when the fence is entirely on his own land. But a person who is liable to fence for the benefit of his neighbour may be liable for damage caused to his neighbour's cattle, even if the fence is several feet within his own boundary (cp. *Bennett v. Blackmore*, 1891, 90 L. T. J. 395). In a County Court case, where the plaintiff had acquiesced in the defendant placing a fence on the plaintiff's land to protect a young hedge, the defendant was held liable for injuries caused to the plaintiff's mare by the barbed wire; the learned judge declining to draw the inference that the plaintiff had undertaken either not to use the field for its ordinary and proper purpose, or to do so at his own peril (*Shipton v. Lucas*, 1892, 92 L. T. J. 297).

A barbed wire fence adjoining a public footpath or other highway may be so dangerous as to be a public nuisance, and indictable as such. Any member of the public who sustains particular damage, without negligence on his part, has a right of action. (As to evidence of negligence, when the nuisance is proved, see *Fenna v. Clare* [1895], 1 Q. B. 199.) Thus, where a sudden gust of wind blew the plaintiff's coat against a barbed fence adjoining a public footpath, the owner of the fence was held liable, the County Court judge having found as a fact that the fence was dangerous and a nuisance (*Stewart v. Wright*, 1893, 9 T. L. R. 480). It is possible, though it has not been decided, that a person erecting such a fence may be liable to summary proceedings under sec. 72 of the Highway Act, 1835, for wilfully obstructing the free passage of the footpath or highway (see *Collen v. Ellis*, 1893, 32 L. R. Ir. 491).

The Barbed Wire Act, 1893, 56 & 57 Vict. c. 32, was passed for the purpose of affording a summary procedure for preventing the use for fences of barbed wire which is a nuisance to a highway—that is to say, of “any wire with spikes or jagged projections” “which may probably be injurious to persons or animals lawfully using such highway” (s. 2). The power of initiating proceedings for this purpose is intrusted generally to the local

authority, which is defined to mean (as regards England and Wales) "any county council, any urban sanitary authority, any sanitary authority in London, any highway board, and any other local authorities existing, or that may be hereafter created by Parliament, having control over highways." In rural districts the powers of highway boards and of surveyors of highways have since been transferred generally to the district council, by the Local Government Act, 1894. The Act only applies to highways, but this term includes public footpaths and bridle-paths.

The method of procedure is laid down by sec. 3 of the Act: "(1) Where there is on any land adjoining a highway within the county or district of a local authority a fence made with barbed wire, or in or on which barbed wire has been placed, and the barbed wire is a nuisance to such highway, it shall be lawful for the local authority to serve notice in writing upon the occupier of such land, requiring him within a time therein stated (not to be less than one month, nor more than six months, after the date of the notice) to abate such nuisance. (2) If on the expiration of the time stated in the notice the occupier shall have failed to comply therewith, it shall be lawful for the local authority to apply to a Court of summary jurisdiction, and such Court, if satisfied that the said barbed wire is a nuisance to such highway, may by summary order direct the occupier to abate such nuisance; and on his failure to comply with such order within a reasonable time, the local authority may do whatever may be necessary in execution of the order, and recover in a summary manner the expenses incurred in connection therewith." The only appeal is on points of law by case stated to the High Court. Expenses incurred by a local authority in the execution of the Act are to be defrayed in like manner as the expenses of the local authority incurred in respect of any highways (s. 5).

Where the local authority are the occupiers of the land, proceedings under the Act may be taken by any ratepayer within their district, and a notice to the local authority to abate the nuisance shall be deemed to be properly served if it is served upon the clerk of the local authority, and any ratepayer taking proceedings may do all acts and things which a local authority is empowered to do (s. 4).

[See Lumley, *Public Health*, vol. ii. p. 1337. The cases up to 1892 are also summarised in an article in *The Justice of the Peace*, vol. lvi. p. 163. An article in the *Law Times*, vol. xcv. p. 419, collects some notes of cases in the American reports.]

**Bare Trustee.**—This expression is currently used in the text-books to indicate a trustee who has no beneficial interest in the subject-matter of the trust (see Lewin on *Trusts*, 9th ed., pp. 259 and 300). It also occurs in several Acts of Parliament. By the Fines and Recoveries Act (3 & 4 Will. iv. c. 74, s. 31) it is provided that where, under a settlement made before the passing of the Act, the person who under the old law would have been the proper person to make the tenant to the *præcipe* shall be a *bare trustee*, such trustee during the continuance of the estate conferring on him the right to make the tenant to the *præcipe* shall be the protector of the settlement (see Lewin, 428; *Buttonschaw v. Martin*, 1858, John. 89; *In re Ainsley*, 1884, 51 L. T. 780).

Before the general provision of the Conveyancing Act of 1881 that trust estates shall vest in the personal representative of a sole trustee at the latter's death (s. 30), the Vendor and Purchaser Act, 1874 (s. 5), enacted a rule similar, but limited to hereditaments of which a *bare trustee* died.



seised in fee simple. Under this it was held that a *bare trustee* is a trustee to whose office no duties were originally attached, or who, though such duties were originally attached to his office, would at the request of his *cestui-que trust* be compellable in equity to convey the estate to them, or according to their direction (per Hall, V. C., in *Christie v. Ovington*, 1875, 1 Ch. D. 279, followed by Stirling, J., in *re Cunningham & Frayling* [1891], 2 Ch. 567). A dictum of Jessel, M. R. (in a case where the actual decision was that an unpaid vendor is not a *bare trustee* for the purchaser in possession), that a trustee without beneficial interest is a *bare trustee* within the meaning of the Act, whether he has active duties or not (*Morgan v. Swansea Urban Sanitary Authority*, 1878, 9 Ch. D. 582), has not been followed.

When any hereditament is vested in a married woman as a *bare trustee*, she may convey or surrender it as if she were a *feme sole* (although it is not her separate estate) (Trustee Act, 1893, s. 16, replacing Vendor and Purchaser Act, 1874, s. 6). The expression should, apparently, receive the same construction here as in the preceding section of the Vendor and Purchaser Act. In *In re Dochra* (1885, 29 Ch. D. 693), however, Bacon, V. C., held that a married woman who was a trustee for sale was a *bare trustee*.

**Bargain and Sale.**—A bargain and sale at the common law was a contract for the sale, whether of goods and chattels or of any estate or interest in lands, completed by payment of the agreed purchase money. By common usage the phrase is restricted to refer to bargains and sales of estates or interests in lands. At the common law a contract for the sale of lands stood upon the same footing as any other contract, and did not require to be expressed in writing. Therefore a bare parol contract for such sale, when completed by payment of the purchase money, took effect as a bargain and sale at the common law. The effect of the transaction was to raise a use in favour of the bargainee, while the seisin, or other legal estate, remained vested in the bargainor. We may adapt to the case the language of the present day by saying that the bargainor became a trustee for the bargainee, to the extent of the estate or interest comprised in the completed contract. Thus the law stood until the enactment of the Statute of Uses (27 Hen. VIII. c. 10, s. 1).

Subsequently to the enactment of that statute any bargainor, who had an estate of freehold, became seised within the intent of the statute, to the use of the bargainee, for the estate or interest, whether freehold or not, comprised in the bargain and sale. It followed that such estate or interest was executed by the statute in the bargainee, who thereupon became seised, if the estate which he had in use amounted to a freehold, and was adjudged in possession, without actual entry, if such estate amounted only to a chattel interest.

As this statute contained nothing to invalidate a parol contract for the sale of lands, it became possible, by a parol contract for sale followed by payment of the purchase money, to convey to a purchaser an estate of inheritance in lands. This secret mode of conveyance being opposed to the general policy of the law, which strongly favoured the open notoriety of such transactions, a remedy was applied in the same session of Parliament by the enactment of the Statute 27 Hen. VIII. c. 16, commonly called the Statute of Inrolments, which enacted that from the 31st July 1536 no manors, lands, tenements, or other hereditaments should pass from one to another, whereby any estate of *inheritance or freehold* should take effect in any person, or any use thereof be made, by reason only of any *bargain and sale*

thereof, except the same bargain and sale should be made by writing, indented, sealed, and enrolled as therein mentioned; such enrolment to be within six months after the date of the writing. Here "months" means lunar months; and the day of the date is not included in the computation (2 Inst. 674).

The prescribed enrolment is either (1) in one of the Superior Courts at Westminster; or (2) before the *Custos rotulorum* (*q.r.*) and two justices and the clerk of the peace of the county within which the lands are situated; or (3) before two at least of the last-mentioned persons, the clerk of the peace being one. The statute does not apply to lands within cities and boroughs where the mayors or other officers have authority to enrol deeds or writings. Upon being enrolled in due time, the deed takes effect from the date of its execution.

The statute did not render enrolment necessary to the validity of bargains and sales of any interest less than a freehold. Upon this was founded the common assurance usually styled a lease and release, being composed of a bargain and sale for a year, made for a nominal money consideration, usually ten shillings, which was executed by the statute without entry, followed by a release of the reversion, which took effect at the common law.

A bargain and sale, duly enrolled, is at this day a valid assurance (*q.r.*), but it is seldom used in practice. It is open to the objection that, as the bargainee comes in by a use, no further use can be limited upon the seisin acquired by him; such further use being a "use upon a use," and taking effect only as a trust. For this reason it is not adapted either to the limitation of successive legal estates or to the creation of powers.

The last observation is not applicable to assurances which, though made in the form of a bargain and sale, do not take effect by raising a use to be executed by the statute; such as bargains and sales by executors having a common law power of sale, as distinguished from a power to appoint to uses, or executed under the authority of any Act of Parliament specially authorising such conveyance (1 Prest. Contr. 191; 2 *ibid.* 483).

Bargains and sales may now be enrolled in the enrolment department of the central office of the Supreme Court of Judicature (R. S. C. 1883, Ord. lxi. r. 9).

As to bargains and sales of lands in the counties palatine of Lancaster, Chester, and the Bishopric of Durham, see 5 Eliz. c. 26. As to lands in the West Riding of the county of York, see 6 Anne, c. 20, usually cited as 5 & 6 Anne, c. 18. As to lands in the East Riding and town and county of the town of Kingston-upon-Hull, see 6 Anne, c. 62, s. 16, usually cited as 6 Anne, c. 35, s. 16. As to lands in the North Riding, see 8 Geo. II. c. 6, s. 21. The three last-mentioned enactments have been repealed by the Yorkshire Registries Act, 1884.

**Barge, Stealing from.**—Under the Larceny Act, 1861, 24 & 25 Vict. c. 96, s. 63, it is felony to steal any goods or merchandise in any vessel, barge, or boat of any description whatsoever, in any haven or in any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with such haven, port, river, or canal. The offence is punishable by penal servitude for not more than fourteen years nor less than three years, or by imprisonment, with or without hard labour, for not more than two years (24 & 25 Vict. c. 96, s. 63, as modified by 54 & 55 Vict. c. 69, s. 1). The offender may also be required to

enter into recognisances and find sureties (24 & 25 Vict. c. 96, s. 117). The offence is triable at Quarter Sessions (5 & 6 Vict. c. 38, s. 1). It is said that correct "local description" of the place where the barge lay was essential (*R. v. Pike*, 1784, Leach, 2nd ed., 262; but see 14 & 15 Vict. c. 100, ss. 1, 23).

The terms, goods or merchandise, in the Statute 24 Geo. II. c. 45, of which this is a re-enactment, were held to apply only to such goods, etc. as are ordinarily lodged in vessels (*R. v. Leigh*, 1764, Leach, 2nd ed., 50), but to include passengers' luggage (*R. v. Wright*, 1835, 7 Car. & P. 159).

For other offences as to barges, see CANAL.

[See also Steph. *Dig. Cr. Law*, 5th ed., p. 290; Archb. *Cr. Pl.*, 21st ed., 470; Russ. on *Crimes*, 6th ed., vol. ii. p. 316.]

**Bark.**—See ARSON; MALICIOUS DAMAGE.

**Barmaster** (cp. German *Berg-meister*, superintendent of mines), an officer appointed in each of the Barmote Courts in Derbyshire (see BARMOTE COURT), who acts as surveyor of the mines, bailiff of the Courts and collector of the mineral duties.

Under the Metalliferous Mines Act, 1875, 38 & 39 Vict. c. 39, s. 1, barmasters are required to make returns as to the quantity of minerals produced in mines within their jurisdiction, not employing over twelve persons underground. The Metalliferous Mines Regulation Act, 1872, 35 & 36 Vict. c. 77, also seems to apply to such mines, barmasters being named in sec. 10, now superseded by sec. 1, of the Act of 1875; *Arkwright v. Evans*, 1880, 49 L. J. M. C. 82, which appears to decide the contrary, was argued on an Act 14 & 15 Vict. c. 94, not applying to the mines there in question, which fall under 15 and 16 Vict. c. clxiii.

In Derbyshire the barmaster acted as coroner in respect of deaths in the lead mines; but this jurisdiction appears to have been taken away by the Acts above cited, which prescribe his present duties.

The lessees or grantees of the Crown mining rights were at one time appointed barmasters, but this was declared illegal (*Arkwright v. Cantrill*, 1837, 7 Ad. & E. 565), and the barmasters are appointed for High Peak and Wirksworth by the Crown by letters patent under the seal of the Duchy of Lancaster (Act of 1851, s. 9; of 1852, s. 18), and in the other mining areas by the lords (15 & 16 Vict. c. clxiii. s. 19). The appointments are made "during pleasure." The barmaster may appoint one or more deputies (for whose acts he is not responsible) (14 & 15 Vict. c. 94, ss. 9-14; 15 & 16 Vict. c. clxiii. ss. 18-23).

As to barmasters and like offices in *Devon and Cornwall*, see STANNARIES.

**Barmote Court.**—This term is also written Berghmote, Barghmote, Bargemote, Barrmote or Barmoot, and seems to be derived from O. E. beorgh, a hill (cp. Burrow, Barrow, and German Bergbau, mining). It is applied to Courts held in the lead mining districts of Derbyshire for the determination of the customs as to lead mining and the settlement of disputes incidental to that industry. There are seven distinct areas, for each whereof these Courts are or may be held.

1. The King's Fee or Field (*feodum domini regis*), in the High Peak (comprising the liberties or districts of Castleton, Bradwell, Great and

Little Hucklow, Monyash, Taddington, Upper Haddon, and Winster), of which the Crown is seised in right of the Duchy of Lancaster, subject to a grant of the mineral duties payable to the Crown made to the Dukes of Devonshire about 1690 (*A.-G. v. Wall*, 1760, 4 Bro. P. C. 667; and as to later demises, see *A.-G. of Duchy of Lancaster v. Duke of Devonshire*, 1884, 14 Q. B. D. 195).

2. The King's Fee or Field in the soke or wapentake of Wirksworth, of which the Crown is seised in right of the Duchy of Lancaster, subject to leases of the mineral duties (see *Arkwright v. Evans*, 1880, 49 L. J. M. C. 82).

In these Crown lands all subjects have had from time immemorial a right to search for, sink, and dig mines or veins of lead or lead ore, subject to certain ancient mineral laws and customs, paying to the sovereign or his lessees certain duties known as "lot" (being the thirteenth dish of ore), and "cope" (a charge per load for liberty to sell the ore raised). The standard dish for Wirksworth, made in 1513, is preserved in the Moot Hall there (Board of Trade Report, 1879, Parl. Pap., 1878-79, 368).

The earliest record of these customs is under an inquisition made in 1288 (16 Edw. I.), in return to a writ of *quo warranto*, where they are described as the liberties used *per totum feodum domini regis in Pecco* (Mander, *Derbyshire Miners' Glossary*, 1824, 1-3). The customs of the areas were not identical, but Courts admitted the custom of one district to explain that of another (*Dean, etc. of Ely v. Warren*, 1741, 2 Atk. 189; *Marquis of Anglesey v. Lord Hatherton*, 1842, 10 Mec. & W. 218, 237).

The High Peak was, until 1851, also regulated by customs and articles of 1601 (Mander, 119-131). By the High Peak Mining Customs and Mineral Courts Act, 1851, 14 & 15 Vict. c. 94, these customs, then uncertain and undefined and inapplicable to modern mining operations, were revised, altered, and amended, and extended to all parts of the High Peak, in which the sovereign in right of the Duchy of Lancaster is entitled to the mineral duties. And power was given (s. 56) to make new and additional customs, etc., subject to the approval of the Chancellor of the Duchy. The customs, as altered, are scheduled to the Act of 1851, and with those made in 1859, printed in Statutory Rules and Orders, Revised, vol. iv. pp. 24-36, override all prior customs of the High Peak (Act, s. 16). They include a right of miners to remove their mining buildings, which do not fall to the lord of the soil (*Wakel v. Hall*, 1883, 8 App. Cas. 195).

The soke of Wirksworth was till 1852 regulated by customs of 1665, 1708, 1709, and 1720 (Mander, 83-117; Hardy, *Miners' Guide*, 2nd ed., 1762), and is now governed by the Derbyshire Mining Customs and Mineral Courts Act, 1852, 15 & 16 Vict. c. clxiii, an Act closely resembling that of 1851 for the High Peak.

The customary right of lead mining also extends to a number of districts, manors, or liberties in which the right to the minerals or mineral duties is in private hands.

3. The manor and liberty of Crich (15 & 16 Vict. c. clxiii. s. 13).

4. The united manors and liberties of Ashford, Tideswell, Peak Forest, and Hartington (s. 12).

5. The manor and liberty of Litton (s. 14).

6. The manor and liberty of Yowlgrave (s. 15).

7. The united manor and liberty of Stoney Middleton and Eyam (s. 12). Certain parts of Eyam claim as "ancient freeholds" to be exempt from the custom (see s. 26, and *Wright v. Pitt*, 1870, L. R. 12 Eq. 408).

The customs of all these private manors, like that of Wirksworth, are

now regulated by the schedule to the Act of 1851. Each of these districts has distinct rights (*Wake v. Redfearn*, 1880, 43 L. T. 123) and distinct Barmote Courts. Each district has a great Barmote Court and a small Barmote Court, both Courts of Record (14 & 15 Vict. c. 94 s. 15; 15 & 16 Vict. c. clxiii. s. 24), held in the Duchy districts before a steward appointed by the Crown under the seal of the Duchy of Lancaster (Act of 1851, s. 3; 1852, s. 3); in the other areas by the lord. He is judge and keeper of the records, etc. of the Court, and may appoint a deputy (1851, ss. 5, 15; 1852, ss. 9, 24).

In the High Peak, the great Barmote Court sits twice annually at Monyash (Act of 1851, s. 6). In Wirksworth it sits twice annually at the Moot Hall in Wirksworth (Act of 1852, s. 11). This Court swears in a grand jury, and on occasion determines the customs and laws of lead mining.

Small Barmote Courts may be held where and when required, to determine questions of title (see *Sybray v. White*, 1836, 1 Mee. & W. 435) or trespass to lead mines, and debt for mining articles or work and labour done. The practice and procedure is regulated as to the High Peak by the Act of 1851 and rules of 1859 (St. R. & O. Rev. vol. iv. pp. 24-36), and as to the other areas by the Act of 1852.

The jurisdiction of the Courts is not exclusive, and an appeal by way of *certiorari* lies (14 & 15 Vict. c. 94, ss. 29, 55; 15 & 16 Vict. clxiii. ss. 38, 63).

[*Authorities*.—Hooson, *Min. Dict.* 1742; Hardy, *Miners' Guide*, 2nd ed., 1762; Mander, *Derbyshire Miners' Glossary*, 1824; Tapping on the Act of 1851; Bainbridge on *Mines*, 4th ed., 138-145; M'Swinney on *Mines*, 1884, 500-519; and see Woolley's *Derbyshire M.S. Collections*, 75 vols., British Museum additional MSS.]

**Barnard's Inn.**—See INNS OF CHANCERY.

**Baron.**—See BARONY.

**Baron of the Exchequer.**—See SUPREME COURT.

**Baronet.**—A hereditary dignity entitling the owner to the prefix Sir before his Christian name, created by patent, and giving to its holder precedence after the younger sons of barons. The wife of a baronet is styled Lady, or in more formal documents Dame. The order of the baronetage was established by King James the First in 1611, under the following circumstances. Money being needed for the support of an army in Ulster, the king offered the title of baronet to all persons of good repute, being knights or esquires possessed of land worth £1000 a year, provided that they were willing to pay the Exchequer £1080 in three annual payments. Baronets were created in Ulster by the same king in 1619. The order was introduced into Scotland in 1625 by King Charles the First, and was in its origin connected with a scheme for the colonisation of Nova Scotia, the earlier members of that order receiving charters of baronies in that country as one of the conditions of receiving their title (see *Green's Encyclopædia of Scotch Law*, Article "Baronet," vol. ii. p. 33). The members of this branch of the order are entitled to bear on an inscutcheon on their

shield, or on a badge suspended from it, the arms of Nova Scotia, arg. a saltire az. thereon on an inescutcheon the Royal Arms of Scotland. They are entitled also to wear as a personal decoration a gold and enamel badge consisting of the above-mentioned arms of Nova Scotia imperially crowned within an azure garter, on which is the legend in gold, *Fax mentis honesta gloria*. The badge is suspended round the neck by an orange-coloured silk ribbon (see Green's *Encyclopædia of Scotch Law*, *supra*). The baronets of England and Ireland bear as an honourable augmentation on a canton in their armorial ensigns the Royal Arms of Ulster, viz. arg. a sinister hand erect gu. (Burke's *Peerage*, *etc.*, Intro. cxxxvii.). In Charles the First's time the limitations in patents of baronetcies were generally made to heirs-male whatsoever; but since that time they have been generally made to heirs-male of the body. Baronets take precedence among themselves *inter se*, according to the dates of their patents; but the Acts of Union with Scotland and Ireland made no provision for the precedence of baronets of those countries in England. Somewhat on the analogy of the peerage, it is believed that baronets take precedence in the following order:—

- (1) Baronets of England and Ulster, with patents dating between 1611–1707.
- (2) Baronets of Scotland, with patents dating between 1611–1707.
- (3) Baronets of Great Britain, with patents dating from 1801.
- (4) Baronets of the United Kingdom, with patents dating from 1801.

All baronets now created are baronets of the United Kingdom. Baronets' eldest sons take precedence after the eldest sons of the younger sons of peers, and a baronet's daughters enjoy the precedence of their eldest brothers. See PRECEDENCE.

**Barony.**—1. *By Tenure.*—A barony was an aggregate of knights' fees held of the king in chief by a single title. Originally no specific number of knights' fees was requisite to constitute a barony; the doctrine that thirteen and a half were requisite seems to be based upon the fact that the relief for a baron was one hundred marks, and the relief for a knight one hundred shillings. If a barony fell into the king's hands, it did not merge in other royal property; the knights would hold not of the king *ut de corona*, but of the king *ut de baronia*. (See HONOUR.) The king could, and constantly did, regrant the barony in its entirety to some new tenant.

In early times one of the incidents of a tenure by barony was liability to a summons to Parliament; this was looked upon as a burden and not as a privilege. The summons, however, was made at the king's discretion, and it was not until the middle of the reign of Edward III. that there was any regularity in the number of persons so summoned. In the reign of Richard II. a baron was created for the first time by patent; and as this method of creation became commoner, the notion that the holding of a barony carried with it a liability to a summons in Parliament died out. From this time a seat in Parliament was regarded no longer as a burden but a privilege.

In the year 1660 in the *Fitzwalter* case (Collins, *Proceedings*, 287), "the nature of barony by tenure being discoursed, it was found to have been discontinued for many ages, and not in being, and so not fit to be revived, or to admit any pretence of right to succession thereupon."

The last case of a claim to a peerage by reason of tenure was the *Berkley* case (8 Cl. H. L. 1) in 1863, in which an adverse decision was given to a claim to a barony by tenure.

2. *By Writ*.—A degree of nobility which entitles the person enjoying it to a seat in the House of Lords, provided that he is not personally disqualified under some rule of law or resolution or standing order of the House. Baronies are now of two sorts, namely, those created by writ, and those created by letters patent. Since the reign of Henry VI. the usual mode of creating them has been by letters patent.

According to the *Reports on the Dignity of a Peer*, vol. ii. p. 28, a resolution of the House in the case of Jervis Clifton, 1673 (*Journals of the House of Lords*, vol. xii. p. 630), decided that a writ of summons and sitting in Parliament, vested in the person so summoned and seated, a dignity descendible to the heirs of his body, though no words in the writ expressed an intent in the Crown to grant a dignity so descendible. Inasmuch as the resolution was based upon the facts of a particular case, this proposition appears to be too general. There is certainly evidence that in earlier times persons have been summoned, and have probably sat in Parliament, whose descendants have not been summoned. Indeed, on a subsequent page of the report the committee state that it seems evident that the resolution in the case of the *Barony of Clifton* in 1673 (unless qualified by circumstances) was not always considered as law. But although it is uncertain at what date a summons followed by a sitting first operated to give a hereditary right to a seat in the House of Lords, the decision in the *Clifton* case has been followed in all subsequent cases.

The title to every barony must be by record. In the case of the *Barony of Grey de Ruthyn*, Lord Chief Justice Brampton said, "Baron or no baron must be tried by record; so that whosoever shall make a title to a barony must resort to the record, and begin his title there, and so consequently must make himself heir to the person first ennobled by that record" (Collins, *Proceedings*, 256). The *Journals of the House of Lords* do not begin till 1 Henry VIII., and those from the seventh to the twenty-fifth year of the same reign no longer exist. In order to prove a sitting before the reign of Henry VIII. recourse must be had to the *Rolls of Parliament*, from which proof of a sitting in Parliament can sometimes be obtained. The writs of summons were enrolled upon the Close Rolls, but even a series of writs addressed to an individual, and afterwards to his heir, is not considered proof of his ever having sat in Parliament. On the other hand, where the *Rolls* record a long series of writs addressed to several successive ancestors of a claimant, it is sufficient to prove that any one of them sat; if this is established, the precedence of the barony is determined by the first writ (Courthope, xxxvi.).

The descent of a barony by writ is not the same as that of an estate in lands of fee-simple. On the death of the baron leaving no male issue and more than one daughter, the barony falls into abeyance. The law of abeyance is explained by the unanimous opinion of the judges given in the year 1839 with respect to a claim to the barony of Camoys.

"It has been indeed the established and undoubted law upon this subject from a very early period of our history, that in the case of a barony descendible either to the heirs general or to the heirs of the body, if the baron die leaving only daughters or sisters or other co-heirs, the barony is in abeyance so long as more than one of such co-heirs is in existence, but so nevertheless that the Crown, the sovereign of honour and dignity, may at any time during such abeyance determine it by conferring the dignity upon whichever of the co-heirs it pleases; but if the Crown do not exercise such prerogative, and the lines of all the co-heirs but one become extinct, then the abeyance is at an end, and such

"only surviving co-heir is entitled, as a matter of right, to the enjoyment of the dignity" (6 Cl. & Fin. 847).

This statement has been criticised by Mr. L. O. Pike in his *Constitutional History of the House of Lords*, who shows that the doctrine of abeyance was not recognised before the reign of Charles II. It seems to have been first acknowledged in the year 1695, when the House of Lords resolved that if a person summoned to Parliament by writ and sitting, died leaving issue two or more daughters who all die, one of them only leaving issue, such issue has a right to demand a summons to Parliament. To this resolution a protest was entered by the minority (*Journals of the House of Lords*, vol. xv. p. 522). Some seventy years earlier it had been held in the case of the *Earl of Oxford* (Collins, *Proceedings*, 269), that a barony descending to co-heirs reverted to the king and was at his disposal.

The mode of terminating an abeyance is by addressing a writ of summons in the style of the barony in abeyance to the person in whose favour it is terminated. If, however, that person is already a peer, or is a female, the abeyance is terminated by a patent.

The eldest son of a peer having more than one title is sometimes summoned to the House of Lords by a writ of summons addressed to him in one of his father's baronies. This does not operate as the creation of a new barony, although the title and dignity will in general descend to the heir of the person so summoned. But the heir must also be heir-apparent to the barony under the original creation. If, therefore, a barony were created by patent and descendible to heirs male, an only daughter of the person so summoned could not claim her father's barony under his writ of summons.

It appears from the case of the *Barony of Lumley*, 1723 (*Journals of the House of Lords*, vol. xxii. p. 298), that where the eldest son of a person possessed of a barony by writ has been attainted of high treason and died in the lifetime of his father leaving issue, the barony becomes extinct. But the attainder of a person who need not be mentioned in tracing the descent does not extinguish the barony (Cruise, 127). Thus if a baron by writ has two sons, the elder of whom is attainted and dies in the lifetime of his father without leaving issue, the attainder is no bar to a claim by the younger son.

See Cruise on *Dignities*, 1823; *Reports on the Dignity of a Peer*, 1820; Collins, *Proceedings, Precedents, and Arguments on Claims and Controversies concerning Baronies by Writ*, 1734; Courthope, *Historic Peerage of England*, 1856; and especially L. O. Pike, *Constitutional History of the House of Lords*, 1894.

3. *By Patent*.—See HOUSE OF LORDS.

**Barrator or Barretor.**—SEE BARRATRY (3).

**Barratry.**—This term seems to be derived from Old Fr. *baratarie*, Ital. *baratteria*, meaning (1) barter, (2) cheating or knavery. As to the history and derivation of the word, see Murray, *New Dict. Eng. Lang.*, s.v. *Barrator*, *Barratry*; Ste. Palaye, *Hist. Dict. Fr. Lang.*, s.v. *Barater*, *Baraterie*; Littré, *Dict. Fr. Lang.*, s.v. *Baraterie*.

As a law term, it has four distinct meanings—(1) In ecclesiastical and Scots law, simony (*q.v.*); (2) in civil and Scots law, judicial corruption (see 8 Co. Rep. 37); (3) at common law, the stirring up or taking part in the quarrels



of others, whether at law or *in pais*. In connection with this sense the word barrator is used; (4) in the law merchant, certain forms of fraud and misconduct by masters and mariners (see *Austen v. Castelyn*, 1541, 6 Seld. Socy. Publications, 106), which come near to piracy (*piraterie*). In connection with this sense the adjective barratrous is used. See BARRATRY (IN MARINE INSURANCE).

(3) Common barratry is a form of public nuisance at common law, punishable as a misdemeanour by fine or imprisonment, without hard labour and without statutory limits, or by requiring sureties for good behaviour and the peace. It is triable at Quarter Sessions (34 Edw. III. c. 1; 5 & 6 Vict. c. 38, s. 1). It consists in *habitually* moving, exciting, or maintaining suits or quarrels (1) in Courts, whether of record or not, by unjust or feigned suits or information on penal laws (see CHAMPERTY; EMBRACERY; MAINTENANCE); or (2) in the country (a) by disturbance of the peace by brawls or affrays, (b) by taking or detaining possession of houses, lands, or goods which are in question or controversy, not only by force (see FORCIBLE ENTRY), but also by subtilty or deceit, and for the most part in suppression of truth or right (*Case of Barretry*, 1588, 8 Co. Rep. 36); (c) by false inventions and sowing of calumny, rumours, and reports, whereby discord and disquiet arise between neighbours (see SCOLD). It is not quite the same as *maintenance* (*q.v.*), which consists not in the nuisance caused by a *general* practice, but in interference by a *particular* suit, without common interest or charitable motives (see *Bradlaugh v. Newdegate*, 1883, 11 Q. B. D. 1; *Harris v. Brisco*, 1886, 17 Q. B. D. 504), and from *champerty*, in which it is necessary to prove a contract to have part of the thing in suit.

Precedents of indictments for common barratry are given in Jacob, *Law Dict. s.v. Barrator*; 2 Chit. *Cr. Law*, 232 (a), and *Crown Circuit Companion*, 7th ed., 706. The essentials of the indictment are—(1) use of the words, “common barrator” (*R. v. Hardwicke*, 1666, Sid. 282), and (2) apparently of the words “to the common nuisance of the liege subjects of our said lady the Queen” (*R. v. Cooper*, 1745, 2 Stra. 1246), though the older precedents do not contain these words. The words, “against the peace, etc.,” were at one time held essential, but the addition or absence of the words “against the form, etc.,” did not vitiate the indictment (see now 14 & 15 Vict. c. 100, s. 1), and local description was never necessary (Hawk., P. C., bk. 2, c. 81, s. 12). Indictments for barratry were an exception of ancient date to the rule that the particular acts relied on as constituting the offence must be specified (*Palfrey's case*, 1621, Cro. Jac. 527; *J. Anson v. Stuart*, 1787, 1 T. R. 752, 754); but particulars may be ordered to be given of the acts to be relied upon in support of the charge, and, if they are not given, the Court will not allow any evidence to be given (*Godderd v. Smith*, 1704, 6 Mod. 262).

A man is not a common barrator in respect of actions, however many or groundless, brought in his own right (*Somes' case*, 1615, Vin. Abr. tit. Barrators, A. 2). The only remedy against him is by costs, or under the Vexatious Actions Act, 1896, 59 & 60 Vict. c. 51. See ABUSE OF PROCESS. Where the proceedings are of a criminal or quasi-criminal character, the remedy is by action of malicious prosecution; or if the facts establish criminal conspiracy, by indictment.

A barrister has been convicted of common barratry, who received a lay client in his house and brought several groundless suits in his name (*R. v. —*, 1685, 3 Mod. 97). An attorney has been held not to be a common barrator for maintaining another in a groundless action to the institution whereof he was not privy. In such a case the remedy now would be to make him pay

the costs of the defendant (R. S. C., 1883, O. lxx.; *Harbin v. Masterman*, [1896], 1 Ch. 351), or to take disciplinary proceedings under the Solicitors Acts, to strike him off the rolls (see *Aylwin's case*, 1655, Sty. 483).

Common barratry was the subject of legislative censure in many early statutes. By Stat. Westm. 1 (3 Edw. I. c. 33), sheriffs permitting barrators in their shires, and the barrators, were to be grievously punished by the king. The *Ordinacio de Conspiratoribus* (33 Edw. I.) is read as applying to some extent to the same offence (see MAINTENANCE; MALICIOUS PROSECUTION). By 1 Edw. III. Stat. 2, c. 14, barrators were disqualified from being in the commission of the peace. By 34 Edw. III. c. 1, justices of the peace are given power to restrain offenders (mesfesours), rioters, and other barrators, and to pursue, arrest, take, and chastise them according to their trespass or offence. Common barratry is also said to be an offence against the statutes relating to maintenance (*Chapman's case*, 1633, Cro. (3) 340), and by sec. 4 of the Frivolous Arrests Act, 1725, 12 Geo. I. c. 29 (made perpetual by 21 Geo. II. c. 3), attorneys or solicitors who practise as such in any suit, after conviction of common barratry, are liable, on summary conviction by the Court in which the action is brought, to transportation (now penal servitude) for seven years. This provision, though unrepealed, is happily superseded by the procedure under the Solicitors Acts. There is no recent precedent of an indictment being found for common barratry, nor was it included in the Draft Criminal Codes of 1878, 1879, or 1880.

[*Authorities*.—Pollock and Maitland, *Hist. Eng. Law*; Co. Lit. 368; Vin. Abr., 1748, s.v. Barratry; Hawk., P. C., bk. i. c. 81; 2, Wms. Saund. 308; Stephen, *Dig. Crim. Law*, 5th ed., art. 156, and App. iii.; 3 Stephen, *Hist. Crim. Law*, 234–240; 1 Russ. on *Crimes*, 6th ed., 489.]

**Barratry.**—(IN MARINE INSURANCE).—"Barratry," or "barratry of master and mariners," is generally one of the perils insured against in marine policies of insurance; it is also an exception to the shipowner's liability commonly found in bills of lading. The word has been derived from the Italian *barattare*, to cheat, or *baratteria*, fraud (Lord Mansfield, *Vallejo v. Wheeler*, 1774, Cowp. 154; Lord Ellenborough, *Earle v. Roveroft*, 1806, 8 East, 126; 9 R. R. 385); and of the many judicial definitions given of it two are enough to quote. "Barratry must partake of something criminal, and must be committed against the owner by the master and mariners" (Lord Mansfield, *Nutt v. Bourdieu*, 1786, 1 T. R. 323; 1 R. R. 211). "Barratry is an act committed by the master or mariners of a ship, for some unlawful or fraudulent purpose, contrary to their duty to their owners, whereby the latter sustain injury" (Story, J., *Marcardier v. Chesapeake F. C.*, 1814, 8 Crouch, 39; and see Arnould, 774; Phillips, 1062 ff.). In the Bill to codify the law of marine insurance, introduced in 1896, barratry is defined as "including every wrongful act wilfully committed by the master or crew with intent to defraud the owner, or, as the case may be, the charterer."

To constitute barratry, it is essential that a criminal or fraudulent intention should be proved; and misconduct due to gross ignorance, or mistake as to the meaning of instructions, or misapprehension as to the way of carrying them out, is not barratry (*Phyn v. Roy. Ex. A. C.*, 1798, 7 T. R. 505; 4 R. R. 508, captain making a mistake in his reckoning, and consequently deviating from his course and getting the ship captured; *Bottomley v. Bovill*, 1826, 5 Barn. & Cress. 212, master taking an intermediate voyage contrary to his owners' instructions). "In order to

constitute barratry the captain must be proved to have acted against his better judgment" (Lord Ellenborough, *Todd v. Ritchie*, 1816, 1 Stark, 240; 18 R. R. 768). It is also essential that the shipowner should not assent to the barratrous act, or by his negligence fail to prevent it (*Everth v. Hannam*, 1816, 5 Taun. 375; *Pipon v. Cope*, 1808, 1 Camp. 534; 10 R. R. 720). The act need not be intended to be against the interest of the shipowner, or for the benefit of the person committing it; it is enough if it be illegal and brings loss upon the shipowner (*Earle v. Rowcroft*, *ante*, where the captain traded illegally for the owners' benefit and the ship was confiscated). French law makes barratry include the mere fault or negligence of the master or crew (*Code de Commerce*, art. 353); that of other countries, like our own, restricts it to wilful and criminal misconduct. The nature and characteristics of barratry have been fully discussed in the United States (*Atkinson & Hewitt v. Great Western I. C.*, 1872, 27 L. T. 103).

The following are instances of barratry by masters of ships:—sailing out of port without paying port dues, whereby ship and goods became liable to forfeiture (*Knight v. Cambridge*, 1723, 1 Stra. 581); sailing out of port in breach of an embargo (*Robertson v. Ewer*, 1786, 1 T. R. 127; 1 R. R. 164); wilful breach of blockade, though meant for owners' benefit (*Goldschmidt v. Whitmore*, 1811, 3 Taun. 508); criminal delay on a voyage (*Roscow v. Corson*, 1819, 8 Taun. 864; 21 R. R. 507); resistance by a neutral ship to right of search by a belligerent cruiser and attempted rescue (so held in *U. S. Dederer v. Delaware I. C.*, 1807, 2 Wash. C. C. 61, and implied in *Garrels v. Kensington*, 1793, 8 T. R. 230; 4 R. R. 635); smuggling (*Have-lock v. Hancill*, 1789, 3 T. R. 277; 1 R. R. 703; *Cory v. Burr*, 1883, 8 App. Cas. 393, where the barratry was excused by a warranty to be free of capture and seizure); sailing when the wind was unfavourable, after refusing to sail when it was fair, and cutting the cable, contrary to the pilot's instructions, so that the ship drifted on the rocks (*Heyman v. Parish*, 1809, 2 Camp. 149; 11 R. R. 688); and in the United States it has been held that nonfeasance, no less than misfeasance, is barratrous (*Patapsev I. C. v. Coulter*, 1830, 3 Peters, S. C. 222, *e.g.* a captain seeing someone in the act of scuttling or firing the ship and not trying to prevent it). A master who is also a supercargo or consignee can commit barratry against the owner (*Earle v. Rowcroft*, above); and so may a master who is part owner of the ship as against a mortgagee (*Small v. U. K. M. M. I. A.*, 1897, 13 T. L. R. 290) or his co-owners, though not as against other persons (*Jones v. Nicholson*, 1854, 10 Ex. Rep. 28). But he cannot, if he is himself the owner or general freighter of the ship (*Ross v. Hunter*, 1790, 4 T. R. 33; 2 R. R. 319); nor can he if he is the equitable owner (*Lewin v. Suasso*, Postl. Dict. Assurance, Lord Hardwicke).

Barratry by the crew includes any crime or fraud producing injury to the ship which could not have been prevented by ordinary force, prudence, or vigilance, exercised by the shipowner or master, *e.g.* mutinously compelling the master to deviate from his course in order to bring in a prize (*Elton v. Brogden*, 1747, 2 Stra. 1264), or to return to port owing to fear of pirates (*Driscoll v. Passmore*, 1798, 1 Bos. & Pul. 200; 4 R. R. 782), or conspiring with prisoners of war, overpowering the master and rest of the crew, and running the ship ashore (*Toulmin v. Anderson*, 1808, 1 Taun. 227; *Hicks v. Thornton*, 1815, Holt, 40).

Barratry may be committed not only against the owner of the ship, but also against a charterer who is *pro hac vice*, or for a voyage only, owner of the ship; and this is the case if the charter-party gives him the complete control and management of her, though the master and crew may be hired and

victualled by the owner. A wrongful act committed by the master with the privity of the owner will thus be barratrous against the charterer, who can recover for such a loss from his underwriters (*Valleja v. Wheeler, ante*; *Soares v. Thornton*, 1817, 7 Taun. 627; 18 R. R. 615). It has been said in one case that under a policy of insurance an act done by the master with the knowledge of the shipowner may be barratrous as against the cargo owner or charterer (*Ionides v. Pender*, 1872, 27 L. T. 244, scuttling the ship, Hannen, J.); but it seems that this can only be so if the charterer is owner *pro hac vice* of the ship, for "barratry cannot be committed against any but the owners of the ship" (Lord Mansfield, *Nutt v. Bourdieu, ante*); and as already pointed out above, no act can be barratrous to which the shipowner is privy, and for this reason an owner of goods on board the ship cannot recover for a loss by barratry in respect of any act of the master done with the privity of the shipowner (*Stamma v. Brown*, 1743, 2 Stra. 1173; *Nutt v. Bourdieu, ante*). Whether an act can be barratrous as against the cargo only, and not as against the ship, is a question which has been raised, but not decided (*Taylor v. Liverpool and G. W. S. C.*, 1874, L. R. 9 Q. B. 546). The owner of a ship chartered for a voyage cannot recover as under barratry for a loss due to an illegal act of the charterer's agent under whose rules the master acted (*Hobbs v. Hapnam*, 1811, 3 Camp. 93; 13 R. R. 764), though the shipowner can, it seems, recover for a barratrous act done by the master with the privity of the charterer, who is not *pro hac vice* owner (*Boutflower v. Wilmer*, 2 Selw. N. P. 973). The American law only regards a person as "owner for the voyage who hires the ship for that voyage, and has exclusive possession, command, and navigation of her" (*Marcadier v. Chesapeake I. C.*, *ante*).

Shipowners are liable to the cargo owner for barratry of their servants which results in damage to cargo, unless they are expressly exempted by their contract (Abbott, 492). Barratry is not included in an exception of "danger of the seas and fire only excepted" in a bill of lading; and the shipowner was consequently held liable for loss caused by the crew barratrously boring holes in the ship in order to scuttle her (*The Chasca*, 1875, L. R. 4 Ad. & Ec. 446). Loss to goods caused by negligent navigation (resulting in collision) of the ship which carried them is not a loss by barratry, though it was provided by statute that any breach of the regulations for navigation was to be considered due to the wilful default of the person in charge of the deck (*Grill v. Gen S. C. C.*, 1866, L. R. 1 C. P. 600). In an American case it was held not to be barratry to carry a cotton cargo on deck after a protest against it from the shipper (*Atkinson and Hewitt v. G. W. I. C.*, *above*). As this exception is only introduced in favour of the shipowner, he cannot shield himself under it from losses produced by acts to which he is privy.

(Arnould, *Marine Insurance*; Phillips, *Insurance*; Carver, *Carriage by Sea*; Scrutton, *Charter-Parties*; Abbott, *Shipping*.)

**Barrister.**—See BARR.

**Bas Chevaliers.**—See KNIGHTS BACHELOR; KNIGHTHOOD.

**Base Court.**—Under this head were classed the various inferior courts, not of record, which formerly exercised judicial functions in this country. They will be found described in the fourth part of Coke's *Institutes*. Chief among them were the courts baron, including the manor,

liberty, honor, wapentake, and cornmote courts, to which may be added the barmote, forest, and fee courts, as well as the court of pleas of our Lady the Queen, the court of the hundred, and the county court in its more ancient form. See COUNTRY COURTS. These inferior courts appear to have exercised an exclusive jurisdiction in pleas under forty shillings (see 6 Edw. I. Stat. Gloucester, c. 8), but by 8 & 9 Vict. c. 127, s. 9, the Privy Council received power to enlarge or restrict this jurisdiction. Originally, the judges were the freehold tenants of the manor, the steward being merely president, but in later times the last-mentioned official tended to become sole judge, especially where he was required to be a barrister or Westminster attorney of standing. From the judge's decisions an appeal lay to the Queen's Bench by writ of false judgment (see 34 & 35 Hen. VIII. c. 27, s. 82), a writ of error being only competent to courts of record. By 9 & 10 Vict. c. 95, s. 14, the lord of the manor received power to surrender his right to hold such courts, and the County Courts Act, 1867, 30 & 31 Vict. c. 142, s. 28, practically abolished them, so far as their judicial functions were concerned, by enacting that no action should henceforth be brought in any inferior court which was competent to the county courts. (See also the Judicature Act, 1873, 36 & 37 Vict. c. 66, ss. 88-91.)

**Base Fee.**—A fee of inheritance may be so qualified that its descent is confined to a particular class of heirs; so long as the heirs fulfil the prescribed qualification, the estate continues, but upon their ceasing to do so it determines. Thus land may be given to a man and his heirs, tenants of the manor of Dale (2 Black. Com. 109, 1 Co. Lit. 27 a). So long as the heirs are tenants of the manor, so long the estate lasts, but no longer. Again, land may be given to a man and his heirs so long as St. Paul's stands (Pl. Com. 557), or till the marriage of a certain person takes place (1 Prest. Est. 432). It then determines upon the event named happening. The first case is of a fee of inheritance qualified, the latter cases are of such a fee determinable. All these are sometimes called base fees. Sir Edward Coke says a fee-simple may be either absolute, conditional, qualified or base; but he remarks that it is more apt to divide fees of inheritance into simple or absolute, conditional, qualified, or base (Co. Lit. 1 b).

Further examples of qualified or determinable fees are when there is a limitation to a man and his heirs, peers of the realm (2 Black. Com. 109, Co. Lit. 27 a); Kings of Scotland (1 Creuse Dig. 64); until a sum is paid to a particular person (Shep. Touch. 122); so long as another has heirs of his body (Pl. Com. 557, Cro. Jac. 593) (11 Rep. 49); until a man attains twenty-one years (*Tracey v. Lethieulier*, 3 Atk. 74); while a particular tree shall stand (11 Rep. 49); so long as A. pays twenty shillings a year to B. (Pl. Com. 557); until he shall otherwise dispose of the same (*Earl of Bath's case*, Carter, 96). These are cases of determinable fees at common law, where the fee ends from its original qualification, and should not be confounded with fees which are cut short by springing or shifting uses (see USES) arising by virtue of the Statute of Uses upon the happening of some event. There cannot be another fee limited in remainder upon the determination of a base or qualified fee; that would be against the doctrine of the common law (1 Prest. Est. 488). But by operation of law, the result may ensue as if a gift in tail is made to a villein and the lord enter, the lord has a fee-simple qualified, and the donor a reversion in fee (Co. Lit. 18 a). It must be understood that the course of descent of the estate cannot be altered, but only qualified, so that as soon as the heir general of the grantee and the tenant

of the manor (in the case last put) cease to be one and the same person, the estate determines. No estate is deemed a fee unless it *may* continue for ever. The interest which, with reference to its continuance, is limited to the period of a life or several lives, is merely a freehold and not a fee. A limitation to a man and his heirs during the life of J. S. does not pass an estate in fee. Though the estate may be taken in succession, or rather by transmission, to occupants during the period limited, it is not properly an estate of inheritance, but a freehold descendible (*Chudleigh's case*, 1589, 1 Rep. 140 b, 10 Rep. 98). See ESTATES FOR LIFE.

When the holder of a qualified fee grants it to another and his heirs, this other holds the estate subject to its determination by virtue of the original qualification, for *Nemo potest plus juris in alium transferre quam ipse habet*. Thus, if one who holds to him and his heirs, tenants of the manor of Dale, grants to another and his heirs, this latter has a fee-simple only so long as the grantee and his heirs are tenants of Dale.

The commonest case of a base fee is that which arises where a tenant in tail in remainder executes and enrolls a disentailing deed in conformity with the provisions of the Fines and Recoveries Act, 3 & 4 Will. IV. c. 74, but without getting the consent of the tenant for life in possession, the "protector" of the settlement. The deed operates to bar the rights of the issue of the tenant in tail, but not those of the remainder men, and the grantee under the deed thus gets a fee-simple determinable upon the failure of heritable issue of the former tenant in tail. This base fee may be enlarged by the former tenant in tail into a fee-simple by the same method by which an estate tail is barred, the consent of the "protector" (if any) being requisite. If the tenant in tail by the disentailing deed, or subsequently, has parted with the estate to a purchaser, this latter cannot enlarge the base fee. This can only be done by the person who would have been tenant in tail if the estate tail had not been barred (*Bankes v. Small*, 1887, 36 Ch. D. 716).

If a base fee becomes vested in the person who has the immediate reversion in fee, it does not merge, but becomes *ipso facto* enlarged into a fee-simple (3 & 4 Will. IV. c. 74, s. 39).

The estate of a tenant in fee in villein tenure is sometimes called a base fee.

See TENURES ; BASE TENURE.

**Base Tenure** (*bassa tenura*), a tenure by base services ; as opposed to tenure by honourable services (*alta tenura*), that is, knight's service. Also used for tenure in villenage which was at the will of the lord, including tenure by copy of court roll (copyhold), which grew out of tenure in villenage, as distinguished from all free tenures whether by knight's service, serjeanty, free and common socage, or otherwise. The interest of a base tenant is sometimes called "base fee" or "base estate."

**Basset.**—A game of cards made illegal by 12 Geo. II. c. 28 (1738). The first section recites various statutes prohibiting lotteries, and that certain fraudulent games and lotteries had been set up to be determined by the chance of cards and dice, under the denomination of ace of hearts, pharaoh, basset, and hazard. Sec. 2 enacts that those games shall be within the Acts prohibiting lotteries ; and that every person who shall keep the said games shall be subject to all the penalties inflicted upon persons.

keeping lotteries. Sec. 3 enacts that any person playing, or staking, at those games shall be liable to a penalty of £50.

The games may be played in any palace where the sovereign resides (s. 10).

Basset is said to be a modification of pharaoh, or fargo (Bohn, *Handbook of Games*); but it and the others have fallen into disuse; and the mere description of them is unintelligible (Brandt, *Games, Gaming, and Gamesters' Law*, pp. 48-49).

These games being declared to be lotteries are unlawful, whether played in public or private. In *M'Kinnell v. Robinson*, 1838, 3 Mee. & W. 434, money was unsuccessfully sought to be recovered which had been lent for playing at hazard.

**Bastard (or Bastart).**—(1) A person not born in lawful wedlock, or "within a competent time after its determination" (2 Black. Com. 247). (2) A person who, though so born, has been found by legal process to be illegitimate. Some writers use the terms, "spurious offspring" and "adulterine bastard," corresponding respectively to the foregoing subdivisions.

The law of England (and Ireland) differs from that of Scotland, and from the legal systems of many other Christian countries in a material article. The subsequent marriage of the parents will not legitimate spurious offspring. "Once a bastard always a bastard" has been truly said to be the English rule; such was formally declared to be the law of the realm by the temporal peers (20 Hen. III.) when the attempt of the spirituality to bring the common law into accord in this respect with the milder principle of the canon and civil laws, was met with the oft-quoted *Nolumus leges Angliæ mutari*. "The transcendent power of Parliament" (1 Black. Com. 459) alone can legitimate spurious issue; e.g. the natural children of John of Gaunt were made legitimate by statute (20 Rich. II.).

The law deems every child born in wedlock, or within "a competent time" after wedlock has ceased, to be legitimate; and this presumption is just as strong in favour of the legitimacy of children begotten before the marriage as of those begotten after (*Anon. v. Anon.*, 1856, 22 Beav. 481 and 23 Beav. 273). The presumption of legitimacy is "not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive" (per Lord Lyndhurst, *Morris v. Davies*, 1837, 5 Cl. & Fin. 265). But the presumption may be rebutted by evidence; the result of the decided cases is that proof or disproof of "the non-access" of the husband may always be given in spite of presumptions, and that such rules as, e.g., Lord Coke's *inter quatuor maria* (1 Inst. 244A) are not law (see *Morris v. Davies*, *supra cit.*; *Bosville v. A.-G.*, 1887, 12 P. D. 177). On grounds of public policy and decency neither husband nor wife is a competent witness to prove either access or non-access, or to testify to any collateral fact which would tend to prove access or non-access (*R. v. Reading*, 1734, Ca. temp. Ld. Hard. K. B. 79; *Goodright v. Moss*, 1777, 2 Cowp. 594; *The Banbury Peerage Ca.*, 1811, 1 Sim. & St. 153; *R. v. Inhab. of Stourton*, 1836, 5 Ad. & E. 180; *Wright v. Holdgate*, 1850, 3 Car. & Kir. 158; *Anon. v. Anon.*, *supra cit.*). Any admission or conduct of either party which goes to prove or disprove access may be established *aliunde* as part of the *res gestæ* (*The Aylesford Peerage Ca.*, 1885, 11 App. Cas. 1). Both man and woman are competent to testify that they are

not legally married (*R. v. Inhab. of Bramley*, 1795, 6 T. R. 330), or to speak to the fact of adultery.

Parliament has the power to bastardise children; and a bastardising clause was commonly inserted in a divorce bill when the facts warranted such a step (e.g. Richard Savage, the poet, author of "The Bastard," was bastardised in the Macclesfield Divorce Act, 1698). The dissolution of an Irish marriage still needs a private Act of Parliament; in England, under the new state of affairs, introduced by the Divorce Act, a means of deciding the legitimacy or illegitimacy of a person is provided by 21 & 22 Vict. c. 93 (the Legitimacy Declaration Act, 1858) (see *Bosville v. A.-G.*, *supra cit.*). See LEGITIMACY.

The presumption is reversed in the case of a husband and wife living apart; a child born is presumed to be illegitimate, though that presumption, too, is liable to rebuttal. The birth of a bastard is conclusive evidence of adultery in the Divorce Court.

A bastard is, in the language of the old writers, *quasi nullius filius* or *filius populi* (Vin. Abr. 219). In strictness, he has no rights and no duties; to his parents he is as "a stranger"; he is of kin to nobody; he is without a name; he cannot have a testamentary guardian appointed over him, under 12 Car. II. c. 24; though, if he have property, guardians will be given him by the Court; he is not "a child" within the scope of Lord Campbell's Act—ACCIDENT (*q.v.*) (9 & 10 Vict. c. 93; *Dickinson v. N. E. Ry. Co.*, 1863, 33 L. J. Ex. 91); there is no legal obligation upon either his father or his mother to support him, save such as is given by statute; he cannot inherit, and he himself *nullum heredem habere potest nisi de corpore suo habuerit heredem* (Glanville, lib. viii. c. 16); e.g. he may acquire lands in fee, but if he die intestate and childless there is none to succeed him, and they pass to the Crown. A bastard is, in truth, a "*terminus a quo*, the first of his family" (3 Salk. 66). The rigour of the law is well illustrated by the question of Maule, J.: "How does the mother of an illegitimate child differ from a stranger?" (*In re Lloyd*, 1841, 3 Man. & G. 547; noticed in *R. v. Nash*, 1883, 10 Q. B. D. 454, and in *Barnardo v. M'Hugh* [1891], App. Cas. 388). On the other hand, as his parents owe him no duty, so neither does he owe them any; but, while their irresponsibility is not absolute, his freedom from all obligation towards them is unqualified; he cannot be compelled to contribute towards their support. And if he wish to marry under the age of twenty-one, and has no guardians, he may do so without seeking anybody's consent, even though his parents be living. The sole recognition of the fact that a bastard has relatives in blood, if not in law, was the principle rendering him liable to the consequences which befall a person born in wedlock, who shall marry within the prohibited degrees; a bastard may thus be guilty of incest.

The modifications created by statute or by the Courts of this isolation must now be stated. The mother of a bastard owes it a mother's care and nurture, and must not neglect or abandon it. To conceal its birth is an offence by 24 & 25 Vict. c. 100, s. 60, which applies practically to bastards only; 21 Jac. I. c. 27, which made the concealment of a bastard's birth conclusive evidence of its murder, has been repealed. A bastard may be baptized and so gain a Christian name; but otherwise it has no name at all except such as it can gain by "reputation"; it is not enough for the mother to name it (*R. v. Smith*, 1833, 1 Moo. C. C. 402; and *R. v. Waters*, 1835, p. 457 *ibid.*). The duty of maintaining the bastard until the age of sixteen, or, in the case of a female, until she marry, is cast upon the mother by 39 & 40 Vict. c. 61, s. 35. Failing her, the duty falls to the



guardians of the poor. The putative father may be compelled to contribute by legal proceedings (see AFFILIATION). The justices of the peace have power to appoint a person to have the custody of a bastard. A bastard's "settlement" is in the place of his birth, and remains so until he acquire another.

The Court of Chancery early began to mitigate the harshness of the bastard's lot, upon the principle well stated by Lord Cottenham (*In re Spence*, 1847, 2 Ph. Ch. 247). "The Court," he said, "interferes for the protection of infants by virtue of the prerogative which belongs to the Crown as *pater patriæ*, and the exercise of which it delegates to the Great Seal"; and bastards are not beyond the pale of this protection. The principle thus stated now, since equity and law were fused, guides the Court; and, though the mother has no legal right to the custody of her bastard child, the Court recognises "a sort of blood relationship." Jessel, M. R., said (in *R. v. Nash*, *supra cit.*): "The Court is now governed by equitable rules, and in equity regard was always had to the mother, to the putative father, and to the mother's relations"; but consideration is always to be paid to the child's advantage (see *In re Dellar*, 1884, 28 Sol. J. 816; *Ex parte Guardians of St. Mary Abbots*, 1887, 51 J. P. 740; *Larnardo v. M'Hugh*, *supra cit.*).

Accordingly, in respect of the support of bastards, the Court of Chancery showed its mildness (*Beckford v. Beckford*, 1774, Lofft, 490); and the fact that an infant or a bastard, who had always been recognised by the father, continued to live with the lawful child of the same parents after the father's death, was recognised as a good ground for making a liberal allowance for the maintenance of the lawful issue (*Bradshaw v. Bradshaw*, 1820, 1 Jac. & W. 647; 25 R. R. 127). Though illegitimate children cannot, as a rule, take under a will as "children," yet if they have acquired the reputation of children (*Earle v. Wilson*, 1811, 17 Ves. 528; 11 R. R. 130), and if the intention of the deed is manifest, in many cases they may take. The principle which rules them out of the class of "children" is supported by the consideration of the uncertainty arising from allowing bastards to rank; where, however, the circumstances of the case (e.g. if there are none but illegitimate children who are well known and recognised as "children") remove all uncertainty, the rule does not apply. Provision may even be sometimes made for a bastard *en ventre sa mère* (see Powell, *Devises*; *Crook v. Hill*, 1876, 3 Ch. D. 773), if it is sufficiently indicated. The incapacity of a bastard to inherit has always been subject to the exception in favour of a *bastard eigné*; the law is that if the bastard eigné, the son of parents subsequently married, enters upon the land and dies seised of it, and it descends to his issue, the fact of that descent totally bars the rights of the *mulier puisné* (the eigné's younger brother born in wedlock), and all other heirs whether minors or married women or however incapacitated (Lit. s. 399). The same rule is said (Co. Lit. 244A) to hold in the case of two daughters, where the elder, being a bastard, has been allowed to enter peaceably as a coparcener.

The following cases deal with the questions of law arising when children, born out of wedlock, but subsequently legitimated according to the law of some other country by the marriage of the parents, claim to inherit land or to take under a devise or bequest as "children": *Birtwistle v. Vardill*, 1835, 2 Cl. & Fin. 571, and 1840, 7 Cl. & Fin. 895; *Skottowe v. Young*, 1871, L. R. 11 Eq. 474; *In re Goodman's Trusts*, 1880, 14 Ch. D. 619; and 1881, 17 Ch. D. 266; *In re Andros*, 1883, 24 Ch. D. 637; *In re Grey's Trusts* [1892], 3 Ch. 88.

A Scotchman born out of wedlock of Scotch parents, and afterwards legitimised by their marriage, having acquired real estate in England, died intestate and childless; it was held that his father could not inherit, and the property escheated to the Crown (*In re Don's Estate*, 1858, 27 L. J. Ch. 98).

A bastard may acquire property, real and personal, convey, devise, bequeath, and do all other legal acts. If he dies intestate, all his property passes to the Crown. His blood relations will, upon their petition and due proof of the relationship, receive from the Crown the usual proportion returned in such cases (see Hanson, *Death Duties*).

No civil disabilities attach to the *status* of a bastard; he may acquire and enjoy in their fulness all the rights of a citizen; he may be created a peer, or serve as a member of the House of Commons. By the old canon law a bastard was incapable of receiving holy orders, but this is said by Blackstone to be obsolete. But an Archbishop-designate of Canterbury, in formal documents relative to his election, is still described as born of lawful parents, as if this were a necessary condition of eligibility.

The statutes are—7 & 8 Vict. c. 101; 8 Vict. c. 10; 35 & 36 Vict. c. 65; 36 Vict. c. 9 (which are usually spoken of as the bastardy laws); 39 & 40 Vict. c. 61, s. 35; 21 & 22 Vict. c. 93 (the Legitimacy Declaration Act).

[*Authorities*.—Fleta; Bracton; Glanville (lib. vii. c. 16); Lit. (s. 399); Co. Lit. 245; 1 Danv. Abr. 729; 1 Rolle, Abr.; Bacon, *New Abr.* (1832), vol. i. 746–774; Phillimore, *Burn's Eccl. Law*, 1844, vol. i. 117–134; Sir Harris Nicolas, *Adulterine Bastardy*; Simpson, *Infants*; Macpherson, *Infants*; Eversley, *Domestic Relations*; Powell, *Devises*; Martin, *Maintenance, Desertion, and Bastardy*.]

**Basutoland.**—See CAPE COLONY.

**Bath, Order of the.**—The Order of the Bath is the fourth in rank of the seven Royal British Orders of Knighthood instituted or reconstituted at various periods by the sovereign, as distinguished from the State or customary Orders, existing throughout Europe during the Middle Ages. One of these latter Orders became known in England as the Knighthood of the Bath, and arose out of the practice of conferring the degree of Knight Bachelor at the coronation or knighting of the king, and such like “of the greatest ceremonies at the court,” with the full ecclesiastical and other elaborate ritual, of the vigils, the bath, the giving of robes and arms and spurs, and girding with the sword, and other circumstances which, in the earliest ages of chivalry, had been usual in England and Europe generally at the institution of all knights in times of peace, but which later fell into disuse except on the occasions mentioned.

While knights made in the ordinary way by dubbing or the accolade were known as knights of the sword, or Knights Bachelor, those made with the full ceremonies became known as Knights of the Bath; but the writers on the Orders generally refer the first creation of them under that name to the coronation of Henry IV. in 1399, when he made forty-six knights by bathing. The last occasion upon which those knights were created was at the restoration of Charles II., previously to his being crowned. (See Selden, *Titles of Honor*, p. 678; and Anstis, *Knighthood of the Bath*, p. 66.) The essential distinction between these two classes of Knights Bachelor and of the Bath was that the former were created in the simpler fashion in time of war, and the latter in time of peace. Thus in Nicolas, *Orders of Knight-*

*hood*, vol. ii. p. 19, the account of the ecclesiastical ceremonies is given as "The order and manner of creating Knights of the Bath in time of peace, according to the custom of England."

This class of knighthood is not an Order in the proper sense, that of a companionship or capitulary body, with statutes or laws assigned them, with a limited number of members, and rules for the supply of vacancies as they occur, which are the essentials of distinct Orders (Ashmole, *Order of the Garter*, p. 15).

But the "Military Order of the Bath" which is now in existence, and which was established by George I. in 1725, and is designated as "The Most Honourable Order of the Bath," conforms to these requirements. It was professedly a revival of the so-called Order of the Bath previously described; and in the letters patent establishing it, and in the statutes promulgated, all the old ceremonies were set out as having to be observed in the creation of the new Order of knights, unless the sovereign should grant a dispensation. This dispensation it has always of course been the practice to grant, as they are unsuitable to modern ideas; and the accolade is sufficient to invest the person to be knighted with the title and privileges of the Order.

The Order has been several times remodelled, the last occasion being in 1847. Previously it had been exclusively a military Order, but provision was then made by new statutes for the admission of non-military knights.

The Order was divided into three classes, the first being Knights Grand Cross (G.C.B.)—fifty for the military service and twenty-five for the civil service; the second, Knights Commanders (K.C.B.)—one hundred and twenty-three military and eighty civil; the third, Companions (C.B.), consisting of six hundred and ninety military and two hundred and fifty civil.

But in each case these numbers are exclusive of the sovereign, and princes of the blood royal, and distinguished foreigners, military or civil, who are honorary members of the several classes, and otherwise the number has been increased by special powers reserved in the constitution of the Order.

The Insignia of the Order are the Badge, the Collar, and the Star.

The second class are entitled to the distinctive appellation of knighthood, Sir, after being invested with the insignia, and they take precedence of Knights Bachelor. The Companions wear the badge pendent by a narrow red ribbon from the button-hole; they take precedence of Esquires, but they are not entitled to the appellation of knighthood as they are not knights.

No officer can be nominated to the military division of this class unless he has been specially mentioned in the *London Gazette* as having distinguished himself in action against the enemy.

The sovereign is the Grand Master of the Order, the Dean of Westminster is *ex officio* its Dean, and the other officers are the Bath King of Arms, the Registrar and Secretary, and the Gentleman Usher.

The motto of the Order is "Tria juncta in uno."

(See Burke, *Orders of Knighthood*, pp. 104-107; and article "Knighthood," *Encycl. Brit.*, 9th ed., pp. 110-126.)

**Bathing.**—The public at large has no common-law right to bathe in the sea, or to cross the shore for that purpose on foot, or to place bathing-machines there (*Blundell v. Catterall*, 1821, 5 Barn. & Ald. 268; 24 R. R. 353; but see the valuable judgment of Best, J., the dissenting judge). Such a right may exist by prescription or custom, and may be gained and retained by the

owners and occupiers of houses on the seacoast, or by the inhabitants of any village, parish, or district, so long as it can be exercised without creating any public nuisance. The existence and the extent of the right are to be collected in this, as in other instances of customary and prescriptive rights, from the manner in which the particular portion of the seashore in question has from time immemorial been used (see *Mace v. Philcox*, 1864, 15 C. B. N. S. 600; 33 L. J. C. P. 124; and see 5 Barn. & Ald. at p. 306). But the right, if it exists, is always subject to the general law which forbids indecency. Hence, it is an indictable offence for a man to undress himself on the beach and to bathe in the sea near inhabited houses, from which he may be distinctly seen; although these houses may have been recently erected, and although till their erection it was usual for men to bathe there in great numbers (*R. v. Crunden*, 1809, 2 Camp. 89; 11 R. R. 671). So if a man bathes too near a public footpath (*R. v. Reid*, 1871, 12 Cox C. C. 1).

As to erection of baths and washhouses by local authorities, see next Article.

**Baths and Washhouses.**—By a series of statutes known collectively as “The Baths and Washhouses Acts, 1846 to 1896,” provision has been made for enabling local authorities to erect public baths and washhouses. These Acts are adoptive (see ADOPTIVE ACT), in the metropolis by vestries or district boards, in a borough by the borough council, and in a rural parish by the parish meeting; but in the last case, only with the sanction of the Local Government Board. The cost of the erection of baths and washhouses is charged on the rates. By-laws must be framed regulating their use, and the charges to be paid by those taking advantage of them, which charges must not exceed those mentioned in the schedule to the Acts; and copies or sufficient abstracts of the by-laws must be hung up in every bath and washhouse. It is further provided that a certain proportion of the baths and washing accommodation in the washhouses must be set apart for the special use of the labouring classes at a lower charge.

**Battery** (Old French *batterie*, French *battre*, to beat), from the point of view of criminal law, is the actual and intentional application of any physical force of an adverse nature (*Rawlings v. Till*, 1837, 3 Mee. & W. 28) to the person of another, without his consent. If the application is involuntary, accidental, or arises merely from negligence, it is not criminal, although it may amount civilly to trespass to the person. But though the force is given without premeditation and under the influence of strong passion, it is intentional in the eye of the law if applied in an angry, revengeful, rude, insolent, or hostile spirit (*R. v. Sparrow*, 1861, 31 L. J. M. C. 43); and if a man aims a blow at another and hits a third man he is indictable for battery (*R. v. Latimer*, 1886, 17 Q. B. D. 359).

It is not absolutely necessary that there should be contact between the assailant and the assailed. Battery may be committed by throwing a missile or squib which hits (*Scott v. Shepherd*, 1773, 2 Bl. W. 892), or by spitting into a man's face (*R. v. Cotesworth*, 1704, 6 Mod. 172), or by striking a horse on which he is riding (*Anon.* 1640, Jones, W. 444), or by striking or cutting the clothes which he is wearing (*R. v. Day*, 1845, 1 Cox C. C. 207), or setting a dog on him; and it is even contended that to put down an infant with intent to abandon it is battery (3 Russ. on Crimes, 6th ed., 307).

In the Indian Code the offences described as battery, wounding, and maiming are classified together as forms of "criminal force" as distinguished from "assault" (Mayne, *Cr. Law of India*, pp. 165-168, 581-586).

Battery need not involve any appreciable hurt or bodily injury. When it does, the punishment is enhanced by statute. See AGGRAVATED ASSAULT; BODILY HARM; WOUNDING. See also TRESPASS TO THE PERSON.

Battery is an indictable misdemeanour at common law. The punishment is the same as for assault (see ASSAULT), and in practice assault and battery are rarely treated as distinct offences. They are always charged together, since battery always involves an assault, and the tribunal, if battery be not proved, is free to convict of assault (*R. v. Oliver*, 1860, 30 L. J. M. C. 12; *R. v. Yeadon*, 1861, 31 L. J. M. C. 70).

The usual words of an indictment are "unlawfully upon A. did make an assault, and him did then beat (*verberavit*), wound (*vulneravit*), and ill-treat, and other wrongs (*alia enormia*) to him then did."

The defences to an indictment for battery are numerous:

1. Misadventure or accident, hostile intention being an ingredient in the offence (*Wakeman v. Robinson*, 1823, 1 Bing. 213; 25 R. R. 618).

2. (a) Consent, which amounts to leave and licence (see ASSAULT); and (b) amicable contest, *e.g.*, while wrestling or engaging in some game not unlawful or dangerous (see BODILY HARM).

3. Defence of self, wife, husband, parent, child, master, or servant (*Tickel v. Read*, 1773, Lofft, 215), if the force is limited to the necessities of the defence (see Dicey, *Law of the Constitution*, 4th ed., App. Note iv.).

4. Defence of property, whether real (see FORCIBLE ENTRY) or personal (*Aldrich v. Wright*, 1873, 53 N. H. 398), or retaking personalty wrongfully in the possession of another (*Blades v. Higgs*, 1861, 10 C. B. N. S. 713).

5. Execution of the law—(a) in effecting arrest or service of process, where the person, whether official or private citizen, is authorised or justified in making and assisting in the arrest or service, and uses no unnecessary force or violence (see ARREST); (b) in carrying out punishment awarded by a court of competent jurisdiction.

6. Chastisement of children by parents or teachers or other persons who have been placed in *loco parentis*, if moderate in manner, instrument, and quantity (see *R. v. Cheeseman*, 1836, 7 Car. & P. 455; *R. v. Griffin*, 1869, 11 Cox C. C. 402; *Clary v. Booth* [1893], 1 Q. B. 465; Prevention of Cruelty to Children Act, 1894, 57 & 58 Vict. c. 41, s. 24). (See CHASTISEMENT.)

7. Discharge by churchwardens (*q.v.*) of their duties under the Canons of 1603 and other laws of the Church, *e.g.*, in whipping little boys who play in church (*Burton v. Henson*, 1842, 10 Mee. & W. 105, 108), taking off the hats of those who will not do it themselves (*Howe v. Planner*, 1666, 1 Saund. 13), or turning disorderly persons out of church (*Asher v. Calcraft*, 1887, 18 Q. B. D. 607; *Taylor v. Timson*, 1888, 20 Q. B. D. 671; Phillimore, *Ecclesiastical Law*, 2nd ed., 737-1427).

8. Previous conviction or acquittal, whether on indictment or summary proceedings. See AUTREFOIS ACQUIT; AUTREFOIS CONVICT.

Of these defences, the first seven can be raised under the defence of "not guilty" (Hawk., P. C., bk. 1, c. 62, s. 3).

[*Authorities.*—Hawk., P. C., bk. 1, c. 62; 3 Russ. on Crimes, 6th ed., 307 *et seq.*; Arch. Cr. Pl., 21st ed., 758-761, 786-788; Mayne, *Cr. Law of India*, 1896, 581 *et seq.*]

**Battle, Trial by.**—1. There was no trial by battle in Anglo-Saxon law, though there was plenty of extra-judicial fighting (Pollock and Maitland, 1 *Hist. Eng. Law*, 16, 28). The oldest mode in England, after the Conquest, of bringing a felon to justice was by appeal or private suit against the wrong-doer by the person primarily wronged (Maitland, *Gloucester Eyre of 1221*, p. xxxvi; Pollock and Maitland, 1 *Hist. Eng. Law*, 16); and the mode of trying such an appeal was by battle or judicial combat. An English accuser was entitled to insist on the wager of battle. If appealed by a Norman, he had the alternative of ordeal (*Urtheil: judicium dei*; see Glanvill, lib. 14, c. 1; Pollock and Maitland, 1 *Hist. Eng. Law*, 68). The ordeal was discontinued in consequence of the decree of the Lateran Council of 1215 (*Concil. Lateran.* iv. c. 18), and about the time of the Great Charter the defendant acquired the right to trial *in pais* (Bracton, *De Coronâ*, f. 137). But the right of the appellee, if he chose to defend himself by his body, continued until 1819, when it was abolished by 59 Geo. III. c. 46, in consequence of the case of *Ashford v. Thornton*, 1819, 1 Barn. & Ald. 405; 19 R. R. 349. During the preceding centuries it had been rarely claimed (see *Brambre's case*, 1388, 1 St. Tri. 89, 114; *Reade v. Rochforth*, 1555, Dyer, 120, 131).

It was a common practice to pardon an approver (see APPROVER) on his confessing his crime and on condition that he appealed and vanquished a certain number of his accomplices (see *Selden Society Publications*, vol. i. xxix, pl. 140, 198).

In appeals the parties must fight themselves if of fit sex or age (Bracton, *De Coronâ*, f. 138. 7).

The procedure of the Court was, unless the appeal was quashed, or the defendant had been taken *in flagranti delicto*, or confessed, to make an order for battle (*consideratum est quod sit duellum inter eos*); and the appellor was required to give gage for proof and the appellee for defence, and the day and place was given for the battle, whence the expression wager of battle, *vadiatio duelli* (Bracton, *De Coronâ*, f. 141, c. xxi.; *Selden Society Publications*, pl. 164, 190, 192, 197; *Ashford v. Thornton*, 1819, 1 Barn. & Ald. at 445). On the day appointed the parties fought in the presence of persons appointed to make a record, armed with shields *et baculis cornutis*, and the issue was decided in favour of the party sustaining the negative propositions at issue if the stars appeared before the fight was over (Pollock and Maitland, 2 *Hist. Eng. Law*, 631; 1 *Selden Society Publications*, pl. 87). An ancient sketch of a judicial combat is given as the frontispiece to 1 *Selden Society Publications*.

2. Until the thirteenth century wager of battle as a mode of trial extended to civil proceedings in the action of debt (Pollock and Maitland, 2 *Hist. Eng. Law*, 203, 212). See WAGER OF LAW.

3. In writs of right the demandant was entitled to offer battle by his champion's body (Pollock and Maitland, 2 *Hist. Eng. Law*, 630; Stat. Westm. 1, 3rd ed., c. 41). The latest instances of trial by battle on these writs seem to be *Low v. Paramour*, 1571, Dyer, 301a; and *Claxton v. Lilburn*, 1638, 2 Rushworth Coll. 788.

4. In the now obsolete Court of the Constable and Marshal (a Court of the civil and not of the common law) trial by combat was allowed when there was only oath against oath (see *Lord Clarendon's case*, 1667, 6 St. Tri. 294, 325). The latest instance of an attempt to use this procedure is *Lord Rea v. Ramsay*, in 1631, where the charge was of treason committed outside the realm. The case is reported in 3 St. Tri. 483, 2 Rushworth Coll. 112, and in MS. by an officer of the Court of Chivalry, preserved in *Domestic State Papers*, 1632, vol. 227.

[For other authorities, see Neilson on *Trial by Combat*; Bracton, *De Coronâ*, ff. 138-142.]

**Bawd.**—(1) A procuress (*lena*), or (2) a whore (*maretoix*). These occupations are not indictable as such (*R. v. Pierson*, 1706, 1 Salk. 382).

**Bawdy House.**—See BROTHEL.

**Bay Window or Bow Window.**—1. Windows of this kind have been held to be buildings within the meaning of covenants in leases or restrictive freehold grants, prohibiting the erection of buildings projecting in front or rear of the demised premises (*Western v. MacDermott*, 1866, L. R. 2 Ch. 72; *Lord Manners v. Johnson*, 1875, 1 Ch. D. 673).

2. Outside London, urban district councils, including town councils, may regulate the construction of bay (or bow) windows and similar projections by by-laws under sec. 157 of the Public Health Act, 1875, 38 & 39 Vict. c. 55, or under the provisions of local Acts. And their projection in front of the general line of buildings is regulated by sec. 156 of the Act of 1875, as modified by sec. 3 of the Public Health Buildings in Streets Act, 1888, 51 & 52 Vict. c. 52.

3. The erection of bay windows in the county of London is regulated by the London Building Act, 1894, 57 & 58 Vict. c. cxxiii. In streets not less than 40 feet wide, bay windows to private dwelling-houses may be erected in front of the general line of buildings, subject to rules as to height and construction, and provided that they are placed on land belonging to the owner of the building, and not on the public way or on any ground agreed to be given up to the public way (s. 73 (5)). Bay windows to other buildings can be erected in front of the general line only by the consent of the London County Council, given after consulting the local authority of the district within which the building lies (s. 75 (5)).

For standing orders and regulations of the Council as to applications, see Glen, *London Building Acts*, 1895, pp. 446, 1526.

**Beach.**—See FORESHORE.

**Beacon ; Beaconage.**—See LIGHTHOUSES.

**Beadle, Bydel.**—The word beadle is said to be of Anglo-Saxon origin (being derived from the word bydel, from *beodan* or *biddan*, to bid ; hence bidding of Beadle). The word is indicative of the duties of the beadle, which are primarily those of a crier or messenger. The word beadle is not confined to the beadle of a parish, the name being used of officers in many ancient institutions, e.g. the Esquire bedels of the Universities of Oxford and Cambridge, and in some hundreds there was an officer known as the Beadle of the Hundred, who was often a man of high position. By the Statute of Exeter, 14 Edw. I. 1286, the bailiffs, or beadles, within every hundred are required to return "the names of all the parishes, half parishes,

and hamlets (*les viles demie viles, e hamelez*) within the hundred. An apparitor (*q.v.*) is also sometimes described as a beadle.

The parish beadle is chosen by the vestry, and it is his duty to give notice to the parishioners of the meetings of the vestry, either by delivering notices from house to house, as in some parishes, or by properly affixing the notices, signed by the proper officers, on the places where they are in all parishes required to be affixed.

He is bound to attend the meetings of the vestry in order to summon any person or officer wanted, or to execute any other services which may be necessary.

He holds office at the pleasure of the vestry, and commonly receives a small salary, payable out of the church rate if there is one. Otherwise he is dependent upon the vote of the vestry.

As a matter of fact, the beadle is generally elected at Easter, at the same time as the other parish officers, *i.e.* for a year.

The beadle usually summons the jury for a coroner's inquest.

It is a custom in some of the wards of the city of London to swear in the beadle as a constable, and he may, it appears, under the common law, arrest and detain in prison for examination persons, whom there is reasonable ground to suspect of felony; but unless sworn as a parish officer, he is not entitled to act as such, or receive into custody a person charged with a breach of the peace or other offence (see *Lawrence v. Hedger*, 1810, 3 Taun. 14; 12 R. R. 571; *Cliffe v. Littlemore*, 1803, 5 Esp. 39). The beadle was primarily a civil and not an ecclesiastical officer; but he was supposed to, and as a matter of fact did, and does, generally attend church. His position as the subordinate of the churchwardens (*q.v.*) probably caused him as a matter of practice to be invested with some of their minor duties in the matter of the regulation of divine service in church. It may also be that as the peace officer in civil matters, he became regarded as the proper person to keep order during divine service in church.

The Act 1 & 2 Will. IV. c. 38, s. 16, treats the beadle in certain churches, where expenses are paid out of pew rates, as an ecclesiastical official, and provides for his payment out of such pew rates.

A parish council can probably appoint a beadle, or appoint its clerk to act as beadle, but it cannot give him any salary.

[Shaw, *Parish Law*, edited by Dodd; Toulmin Smith, *Parish Law*; Steer, *Parish Law*, 10th ed.; Prideaux, *Churchwarden's Guide*; Blunt, *Book of Church Law*.]

**Bear.**—See STOCK EXCHANGE.

**Bear and Pay.**—The object of the covenant by which the lessee undertakes to bear and pay rates, taxes, assessments, and other burdens imposed upon demised premises during the term, is to secure to the lessor the agreed rent free of deductions. Indeed, an undertaking of somewhat similar import is often contained merely in the covenant to pay the agreed rent free from deductions of a specified kind. The covenant is varied in its wording, and the Courts have of late years been frequently called upon to decide how far in particular cases the above-mentioned object of the lessor has been effectuated. In many of the reported cases judicial comments are to be met with to the effect that these decisions are difficult to understand, and apparently often in conflict; and in one of the latest of the reported



decisions (*Tubbs v. Wynne*, [1897] 1 Q. B. 74), *Collins, J.*, observed that it was "not very easy to collect any definite principle from those decisions." The authorities have, whether logically consistent or not, stereotyped those forms of covenants in most general use; and, though it may be difficult, it may perhaps not be impossible to deduce from them a few principles which may at least afford some guide in the general construction of covenants of the kind. With regard to the primary and constant words "rates," "taxes," and "assessments," that is payments of a periodical or recurring character, little if any dispute has arisen. With the exception of the landlord's property tax and tithe rent-charge, which the Legislature has imposed directly upon the owner (for this purpose the lessor), and has prohibited the owner from shifting to the occupier (for this purpose the lessee), rates, taxes, and assessments fall upon the lessee, or, if by primary intendment of statute they are payable by the lessor, may by contract be transferred to the lessee. Where the subject-matter of dispute is a tax, rate, or assessment properly so called, there is little room for difficulty, the lease itself, and, in the event of its silence, the statute which imposes the payment, deciding in plain language the person liable.

The disputes have nearly always arisen on the question whether some single and definite payment exacted by a public authority for some work of permanent improvement or benefit to the premises falls—not within the words "taxes, rates, or assessments," which it clearly does not (*Wilkinson v. Collyer*, 1884, 13 Q. B. D. 1), but—within certain more general words which usually follow them in the covenant, *e.g.* impositions, charges, burdens, duties, or outgoings, payable in respect of the demised premises.

Since the Metropolis Management Acts (18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 102), and the Public Health Acts (38 & 39 Vict. c. 55, and, as to the Metropolis, 54 & 55 Vict. c. 76), superseding in many places local Acts of similar import, a large number of money payments are recoverable by local authorities for local purposes of general improvement, such as paving, levelling, and sewerage; or for incidentally public purposes, such as the abatement of sanitary nuisances. None of these statutes empower local authorities to make a rate, tax, or assessment for such purposes; the powers given them to enforce such obligations are against individuals as in the case of a nuisance, or against an assemblage of individuals like the frontagers of a street in the case of paving. (The payments, too, are all payments of a single and definite nature, exacted from the owner of premises for their more or less permanent benefit.) This statutory authority to be reimbursed by private persons is in antithesis to the right of reimbursement by means of a rate or tax levied (periodically) on all the inhabitants of a district. The ultimate liability for payments of this kind rests either with the owner or the occupier of the tenement affected, and that ultimate liability is determined by the true construction of the covenant in question. The authorities go to establish the conclusion that where the covenant is clear, the length of the demise, the respective benefit accruing to lessor and lessee from the improvement, and the probability of anticipation by them of the claim, are not material considerations.

For the present purpose the statutes here referred to fall into two classes: they either empower the local authority to do the work in question and enforce payment for it, primarily and directly, from the owner of the premises benefited, or they require the owner to do the work himself, and only permit the authority to do it and charge him with the expense upon his default in complying with their order. Now, payments

exacted under statutes of the former class, though not rates, taxes, or assessments, are clearly payments "in respect of the premises." Consequently whenever a word capable of being construed as covering a single definite payment of the kind now considered is found in the covenant the tenant will be liable. *A fortiori* will this result follow where in the manner to be presently explained he has by the use of certain words virtually entered into a contract of indemnity.

The real difficulty, however, has generally arisen with regard to payments exacted under statutes, like the Public Health Acts, of the latter kind. The leading principle established by the decision in *Tidswell v. Whitworth*, 1867, L. R. 2 C. P. 326, is that a payment of this nature is not a payment "in respect of the premises" at all, but one *in the nature of a penalty* demanded from the owner by reason of his default in performing the obligation imposed upon him by the statute. Hence, unless the covenant contain a word or words by which the tenant has undertaken in effect to indemnify his landlord against payments of all kinds, he is not liable. Nor is the circumstance material that the statute, as it often does, permits recourse by the public authority to be had in the first instance to the tenant, but only by way of additional remedy, the intention being to throw the burden of the payment in the absence of special agreement upon the landlord (*Tidswell v. Whitworth*, *supra*). But if the covenant does contain such a word, it would seem that the landlord could recover from the tenant any outlay to which he may have been put, not only under statutes of the class now considered, but also under those of a still different kind; those, namely, where there is no power in the public authority to do itself the work and charge the owner with the expense upon his default, performance being secured by the imposition of penalties only (see, *e.g.*, s. 7 (2) of the Factory Act, 1891).

• The important question consequently is, Which are words of indemnity? The following are the most usual words in this connection:—

(a) *Impositions*.—This has been decided not to be a word of indemnity (*Tidswell v. Whitworth*, *supra*). Yet it is worth pointing out that this is apparently the only one of these words the general scope of which has been restricted by reason of the fact that its collocation with rates, taxes, and assessments in the covenant shows that it imports only payments like them of a recurring nature. The reason for this may possibly be sought for in the circumstance that if the owner on being called upon to do the work ordered chose to comply at once with the order (instead of merely paying for the work upon its execution, in consequence of his default, by the local authority) he could not sue the tenant for the expense which he had incurred (*Tidswell v. Whitworth*, *supra*); and, if so, it cannot be a real word of indemnity. In *Budd v. Marshall*, 1880, 5 C. P. D. 481, Brett, L. J., was apparently of opinion that the word "duties" (as to which see *infra*) should be treated in the same way; but the other members of the Court of Appeal declined to take this view.

(b) *Outgoings*.—This is clearly a word of indemnity (*Crosse v. Raw*, 1874, L. R. 9 Ex. 209; *Budd v. Marshall*, *supra*, see per Brett, L. J.; *Batchelor v. Bigger*, 1889, 60 L. T. 416). It has been said to be "the largest word that can be used" (*Tubbs v. Wynne*, [1897] 1 Q. B. 74). The only case known where the tenant has escaped liability when it has been found in the covenant is that of *Hill v. Edward*, 1884, 1 T. L. R. 253, and that decision has been doubted in *Aldridge v. Ferne*, 1886, 17 Q. B. D. 212.

(c) *Charges*.—This is also a word of indemnity (*Hartley v. Hudson*, 1879, •

4 C. P. D. 367), unless its effect is limited by other words importing that the payments in question are charged or imposed on the premises only, in which case the tenant's liability hinges upon the statute making the payment a charge in the legal sense, and not one imposed on the owner by a merely personal order (*Allum v. Dickinson*, 1882, 9 Q. B. D. 632). It follows that where the covenant contains an expression showing that the charges mentioned cover those imposed "on the lessor," or "on any person," the tenant will be liable (*Smith v. Robinson*, [1893] 2 Q. B. 53), as he would also probably be under a covenant simply to pay charges imposed in respect of the premises, for they must be charged on some person (see per Bruce, J., in *Brett v. Rogers*, 1897, 76 L. T. 26). The only case against the view here expressed is believed to be that of *Rawlins v. Briggs*, 1878, 3 C. P. D. 368; and having regard to sec. 257 of the Public Health Act, 1875, it seems difficult to reconcile that case with *Hartley v. Hudson*, *supra*.

(d) *Burdens*.—This is also a word of indemnity, though not perhaps one of the ordinary ones (*Sweet v. Seager*, 1857, 2 C. B. N. S. 119).

(e) *Duties*.—This is a word of uncertain import; it may mean "obligations," or it may mean "sums due" (*Budd v. Marshall*, 1880, 5 C. P. D. 481, per Brett, L. J.). If the governing words be "bear" or "discharge," in addition to "pay," it means "obligations," and is a word of indemnity (*ibid.*; *Thompson v. Lapworth*, 1868, L. R. 3 C. P. 149; *Clayton v. Smith*, 1894, 11 T. L. R. 374). If the governing word be "pay" only, it is thought that properly it can only mean "sums due," and that it is *not* a word of indemnity. As the matter stands, however, at present this is not the law (*Brett v. Rogers*, *supra*). And so far no case is known where the tenant has not been made liable upon a covenant containing this word.

In the case of sanitary improvements under the Public Health Acts, liability for the work in question might often be enforced against the tenant under his covenant to repair (see *Smith v. Robinson*, [1893] 2 Q. B. 53). The covenant, however, here discussed is so far independent of the latter covenant, that it makes no difference to his liability under it that the tenant may happen to be exonerated from liability for the expense under the covenant to repair (*In re Bettingham*, 1892, 9 T. L. R. 48).

Sometimes, though rarely, liability for rates, taxes, etc., is expressly undertaken by the lessor. A covenant, however, by him to bear and pay any which may be "imposed" on or in respect of the premises, applies only to those of a compulsory nature, and will not render him liable for so-called water "rates" (*Badcock v. Hunt*, 1889, 22 Q. B. D. 145). And a covenant by him to pay all water rates "imposed or assessed upon the premises, or on the lessor or lessees in respect thereof," has been held to be confined to water supplied to the lessees for domestic, as distinguished from trade, purposes (*Floyd v. Lyons*, 1897, 13 T. L. R. 278).

### **Bear-Baiting.**—See ANIMALS.

**Bearer.**—The "bearer" of a bill of exchange or promissory note is the person in possession of a bill or note which is payable to bearer (Bills of Exchange Act, 1882, s. 2). "Holder," as defined by the Act, includes "bearer" (*ibid.*). Only a bill or note expressed to be payable to bearer, or become so payable by reason of an indorsement in blank (s. 8 (3)) can have a "bearer." As to instruments payable to bearer by custom or agreement, see NEGOTIABLE INSTRUMENT and BLANK TRANSFER.

**Beasts.**—See ANIMALS; DISTRESS.

**Beating.**—See BATTERY.

**Bechuanaland.**—A tract of country in South Africa. In 1884 the native powers recognised by the British Government were, Mankoroane, chief of the Batlapins, and Montsioa, chief of the Barolongs. Certain parties of Boers from the Transvaal entered into alliance with the rivals of these two chiefs, acquired a hold on the country, and established the two petty republics of Stellaland and Goshen. The British Government intervened on behalf of its native allies, and, after much fighting and negotiation, a settlement was effected; part of the country was made a colony under the name of British Bechuanaland; a protectorate was established over the country of Khama and other chiefs in the north; and the country as far as the Zambesi was declared to be within the sphere of British influence. A judicial commission was appointed to deal with the thorny question of titles to land; administrative powers were intrusted to the British South Africa Company. British Bechuanaland was incorporated with Cape Colony by an Act of the Cape Parliament, No. 41 of 1895, and by an Order in Council of 3rd October 1895 (St. R. & O., 1895, p. 738). The new province is to be represented by one member in the Legislative Council and three members in the Legislative Assembly; and the Act provides for judicial and fiscal business.

In the case of *R. v. Jameson* [1895], 12 T. L. R. 2 Q. B. 588, it was held that the Foreign Enlistment Act applies to Mafeking in British Bechuanaland, and to Pitsani Pitlogo, which is in the Barolong country.

**Become a Bankrupt.**—The desire of settlors and testators to give to the objects of their bounty a strictly inalienable provision has from the earliest times exercised the ingenuity of conveyancers. The law will not, however, permit property to be settled on a person in such a manner that the interest of the donee shall continue after bankruptcy divested of its legal incidents, one of which is liability to the debts of the donee (*Brandon v. Robinson*, 1811, 18 Ves. 429; 11 R. R. 226); but this principle does not, as Lord Eldon there pointed out, prevent property being given to a person *until* he becomes bankrupt, and there is no distinction for this purpose between a trust until bankruptcy and a trust for life defeasible on bankruptcy (*Dockyer v. Savage*, 1733, 2 Stra. 947).

Such a provision is now very common where the husband's life interest is exposed to risk by reason, for instance, of his being engaged in business. The cesser clause is followed by a provision authorising the trustees of the settlement during the residue of the husband's lifetime to apply in their discretion all or any part of the income for the maintenance of the husband, wife, or children. This secures the income from the husband's creditors; but it is important to note that a man cannot settle his own property so as to take a life interest therein determinable or defeasible on his bankruptcy, for that would be a fraud on his creditors (*Higginbotham v. Holme*, 1812, 19 Ves. 87; 12 R. R. 28); it may be valid, however, to the extent of any property of his wife which the husband may have received on marriage, for to that extent the wife is a purchaser for value, and her

title good as against creditors (*Higginson v. Kelly*, 1810, 1 Ball & B. 252; 12 R. R. 28; *Lester v. Garland*, 1831, 5 Sim. 205).

In *In re Levy's Trust*, 1885, 30 Ch. D. 119, a judicial insolvency in New South Wales was held to work a forfeiture of the insolvent's interest in settled land in England.

A gift over by will on bankruptcy *prima facie* includes a bankruptcy which takes place after the date of the will, and is subsisting at the testator's death, notwithstanding strong words of futurity (*Jarrold v. Moorhouse*, 1837, 1 Russ. & M. 364), or even a bankruptcy which takes place before the date of the will, and is subsisting at the death (*Manning v. Chambers*, 1846, 1 De G. & Sm. 282; *Metcalf v. Metcalf* [1891], 3 Ch. 1). If the bankruptcy is annulled before the period of distribution, the forfeiture does not take effect (*Lloyd v. Lloyd*, 1866, L. R. 2 Eq. 722).

If the gift is immediate and the bankruptcy is annulled within a year, *i.e.* before any right to payment has accrued, the forfeiture will not take effect. So where there is an immediate specific bequest for life, and the bankruptcy is annulled before the day on which the first income becomes payable, there is no forfeiture (*White v. Chitty*, 1866, L. R. 1 Eq. 372). A gift over on bankruptcy will carry over an accrued share (see ACCRUED SHARES) (*Dorsett v. Dorsett*, 1861, 30 Beav. 256). A petition in bankruptcy by the debtor himself will work a forfeiture (*Lloyd v. Lloyd*, *supra*). And see Theobald on *Wills*, 4th ed., 509; Jarm., 4th ed., 864 *et. seq.*

**Bed of River.**—The bed (*alveus*) of a river is the land over which the water normally flows; or, in other words, the land which is in vertical contact, as the banks of the river are in lateral contact, with the flowing water. The term "bed" is commonly used in distinction to bank or shore (*ripa*); though in the case of a tidal river it may be used in a restricted sense, so as to exclude the space between high and low water mark (*Pearce v. Bunting* [1896], 2 Q. B. 360).

The property in the bed of a tidal river is presumptively in the Crown as far as the tide regularly flows and reflows, though it may be in a subject by grant from the Crown (Hale, *De Jure Maris*, c. 4; *Gann v. Whitstable*, 1865, 11 H. L. 192; *Reece v. Miller*, 1882, 8 Q. B. D. 626), or may be vested by statute in commissioners for the protection of navigation.

The property in the bed of a non-tidal river, whether navigable or not, or of a river above the flow of the tide, presumptively belongs to the owner of the land through which the river flows, or to the owners on each side, *usque ad medium filum aquæ* (Hale, *De Jure Maris*, pp. 5, 12; *Bickett v. Morris*, 1866, L. R. 1 Sc. App. 47). But this presumption may be rebutted by showing that one riparian owner is the owner of the whole width of the bed, to the exclusion of the other riparian owner. For this purpose evidence may be given of exclusive acts of ownership exercised either over the particular portion of the bed in dispute, or over other portions of the bed so similarly situated as to raise a reasonable inference of unity of ownership (*Jones v. Williams*, 1837, 2 Mee. & W. 326).

A similar presumption applies in the construction of conveyances. Where a riparian owner, who is also the owner of the bed, makes a grant of his land, the soil of the bed, *usque ad medium filum aquæ*, presumptively passes by the grant (*Micklethwait v. Newlay Bridge Co.*, 1886, 33 Ch. D. 133; *Duke of Devonshire v. Pattinson*, 1887, 20 Q. B. D. 263); and this rule applies to land of any tenure, whether freehold, copyhold, or leasehold (*Tilbury v. Silva*,

1890, 45 Ch. D. 98). In the same way, a third party may be the owner of the bed, to the exclusion of the riparian owner or owners.

It has been decided, in opposition to the dissent of Cockburn, C. J. (in *Marshall v. Ulleswater Steam Navigation Co.*, 1863, 3 B. & S. 746), that the ownership of a several fishery *prima facie* imports ownership of the bed of the stream, that is, that "the owner of the fishery is to be presumed to be also the owner of the soil over which his fishery extends, unless there is evidence to the contrary" (*A.-G. v. Emerson* [1891], App. Cas. 649; *Hindson v. Ashby* [1896], 2 Ch. 1). But though this is now settled law, the extent of such presumptive ownership has never been actually decided, and in *Hindson v. Ashby* (*supra*) the Lords Justices seem to have thought that it may still be treated as only a limited ownership accessory to and for the purposes of the fishery,—a limitation of the doctrine which would appear to weaken the objections of Cockburn, C. J. The terms of the grant of a several fishery may be such as to show that no right to the soil, but only an incorporeal hereditament, was intended to pass by it (*Duke of Somerset v. Fogwell*, 1826, 5 Barn. & Cress. 875).

The owner of the bed may prevent any stranger from trespassing thereon, e.g. from erecting in the *alveus* a pier for embarking and disembarking passengers (*Marshall v. Ulleswater Steam Navigation Co.*, 1863, 3 B. & S. 746). Subject to the rights of others, the owner may make any erection or excavation in the *alveus*, for "the land being covered with water is a mere accident, and the owners are as much at liberty to build on the bed of the river (if thereby they cause no obstruction) as they would be to build on an island which may at some future period be swept away" (Lord Blackburn, *Orr-Ewing v. Colquhoun*, 1877, 2 App. Cas. 839). Thus he may "without any illegality build a mill-dam across the stream, within his own property, and divert the water into a mill-lade, without asking leave of the proprietors above him, provided he builds it at a place so much below the lands of those proprietors as not to obstruct the water from flowing away as freely as it was wont; and without asking leave of the proprietors below him, if he takes care to restore the water to its natural course before it enters their land" (*ibid.*). So, persons deriving right from the owner by way of licence or easement, may fix mooring piles in the bed for the use of an adjoining wharf (*Lancaster v. Eve*, 1859, 5 C. B. N. S. 717), or keep a floating boathouse and wharf moored in the stream (*Booth v. Ratté*, 1890, 15 App. Cas. 188). But the rights of the owner and of persons claiming under him are limited by an obligation to respect the rights of riparian owners, above, opposite, and below, and also, in the case of navigable rivers, the rights of persons entitled to use the navigation.

Riparian owners are entitled to the unimpeded flow of the stream in its natural channel. If one riparian owner encroaches on the bed by erecting any building thereon, the onus is on him to show that it does no injury to other riparian owners, for the maxim applies—*melior est conditio prohibentis* (*Bickett v. Morris*, 1866, L. R. 1 Sc. App. 47). It makes no difference whether the river is navigable or tidal or not (*A.-G. v. Earl of Lonsdale*, 1868, L. R. 7 Eq. 377). The erection *in alveo* of a weir which has a sensibly injurious effect on the flow to and past the premises of a riparian owner, and which could not be used for the purpose for which it was erected without a continuance of such injury, is illegal, and may be restrained by injunction (*Belfast Ropeworks Co. v. Boyd*, 1888, 21 L. R. Ir. 560). To increase the height of an existing weir, so as to raise the water of the river, and to flood the lands of a riparian owner, is actionable even without proof of actual damage (*M'Glone v. Smith*, 1888, 22 L. R. Ir. 559). Similar prin-

ciples may apply to erections even beyond the bed of the stream, but within the "flood *alveus*," or proper waterway of ordinary winter floods (*Menzies v. Breadalbane*, 1828, 3 Wils. & Shaw, 235; Lord Blackburn, *Orr-Ewing v. Colquhoun*, 1877, 2 App. Cas. 839).

In the case of a navigable river, whether tidal or not, the rights of the owner of the bed are subject to the right of navigation, and to whatever is essential for the full enjoyment of that right. Vessels may be entitled to ground at ebb tide until the tide serves for continuing the navigation (*Mayor of Colchester v. Brooke*, 1845, 7 Q. B. 339), or to cast anchor in the bed of the river (*Gann v. Free Fishers of Whitstable*, 1865, 11 H. L. 192). The owner of the soil is not entitled to erect any structure in the bed of the river which will obstruct or interfere with the navigation (*A.-G. v. Terry*, 1874, L. R. 9 Ch. 423; *Orr-Ewing v. Colquhoun*, 1877, 2 App. Cas. 839).

A riparian owner, who is also owner of the *alveus*, has a right (it has even been said that he is under an obligation) to scour the bed so as to remove casual obstructions or shoals (*Rhodes v. Airedale Drainage Commissioners*, 1876, 1 C. P. D. 402); but when, by long-continued accretion, gravel, chalk, or soil has become part of the permanent bed, he has no right to remove it, so as to restore the flow of water to its former state, to the detriment of another riparian owner (*Withers v. Purchase*, 1889, 60 L. T. 819). As to the formation of a shifting island or bank in the bed of a river, see *Earl of Zetland v. Glover Incorporation of Perth*, 1870, L. R. 2 Sc. App. 70.

If a river gradually and imperceptibly shifts its bed, all rights of ownership shift with it; as between opposite riparian proprietors, the centre of the new bed becomes the boundary of the two properties, the one proprietor enjoying the benefit of the accretion, and the other bearing the loss (*In re Hull and Selby Ry.*, 1839, 5 Mee. & W. 327; *Foster v. Wright*, 1878, 4 C. P. D. 438). The owner of a several fishery was held to retain his right after the river had gradually receded from his land and encroached upon and into the land of another proprietor (*Foster v. Wright, supra*). Whether a strip of land has thus ceased to be part of the bed of the river is a question of fact, "often of considerable difficulty, to be determined, not by any hard and fast rule, but by regarding all the material circumstances of the case, including the fluctuations to which the river has been and is subject, the nature of the land, and its growths, and its user" (Romer, J., *Hindson v. Ashby* [1896], 1 Ch. 78; in C. A. [1896], 2 Ch. 1). When a strip of land has long ceased to be part of the bed, evidence of exclusive ownership may defeat the claim of the adjoining owner, and make it unnecessary to inquire whether the change was gradual and imperceptible or not (*Ford v. Lacy*, 1861, 7 H. & N. 151); but the Statute of Limitations cannot begin to run against the adjoining owner until the land has ceased to be part of the bed (*Hindson v. Ashby, supra*).

But if a river change its course perceptibly or violently, the rights of ownership are not changed (*In re Hull and Selby Ry., supra*; *A.-G. v. Chambers*, 1859, 4 De. G. & J. 55). So, if a river permanently abandons a portion of its old bed and takes to an entirely different channel, the ownership is unchanged, and the owner of a several fishery in the old channel does not acquire a similar right in the new one (*Mayor, etc. of Carlisle v. Graham*, 1869, L. R. 4 Ex. 361). Whether the change of bed be gradual and imperceptible or not, a public right of navigation will follow the river to its new course (Holroyd, J., *R. v. Montague*, 1825, 4 Barn. & Cress. 598), but subject to existing obstructions therein, which, if lawful before, do not become unlawful in consequence of the river changing its bed (*Williams v. Wilcox*, 1838, 8 Ad. & E. 314).

[Hale, *De Jure Maris*; Phear on *Rights of Water*; Coulson and Forbes on *Waters*; Angell on *Watercourses*; Leake, *Uses and Profits of Land*.]

**Bedel.**—See **BEADLE**.

**Bedford Level.**—This is the name given to a tract of low-lying country in the eastern counties, formerly known as the Great Level of the Fens, and was so given because the work of draining it effectively was first undertaken by Francis, Earl of Bedford, in the year 1634. The principal statute relating to it was passed in 1663, and is known as 15 Car. II, c. 17. The most important provision of this Act is contained in sec. 8, the effect of which is to place the reclaimed lands on the same footing as lands in the counties of Middlesex and Yorkshire, by requiring conveyances relating to them (except leases for seven years or under in possession) to be registered for their validity. But though the section provides that in case this be not done, no such lease or conveyance “shall be of force,” it has been decided that, as its object was only to take away the priority of a party whose title is not registered as against a party whose title is registered, this does not invalidate the indenture as between the parties themselves, so as to prevent an action upon its covenants (*Hodson v. Sharpe*, 1808, 10 East, 350; 10 R. R. 324).

**Beer.**—The definition of beer for purposes of taxation depends on the Inland Revenue Acts of 1880, 43 & 44 Vict. c. 20, and 1885, 48 & 49 Vict. c. 51, s. 4, and is not confined to beer brewed with malt and hops.

A brewer of beer for sale incurs a fine of £50 and forfeiture of the beer, if he adulterates it or adds to it anything except finings for clarification before delivering it for consumption (48 & 49 Vict. c. 51, s. 8 (1)). A dealer in or retailer of beer is liable to the like fine and forfeiture for adulteration or dilution, even by mixing small beer with strong beer (s. 8 (2)) (*Crofts v. Taylor*, 1888, 19 Q. B. D. 524). The penalties are recoverable by the Inland Revenue authorities (s. 9).

Beer is also within the Sale of Food and Drugs Acts, where a licensed beer seller is convicted of adulteration under any Act. The conviction is entered in the register of licences, and may be indorsed on his licence (37 & 38 Vict. c. 49, s. 14). See **ADULTERATION**; **BREWER**; **LICENSING**.

**Bees.**—These insects were classed by the Roman law writers among animals *feræ naturæ*, and therefore like other wild animals were *res nullius* until captured, when they became the property of the captor by the *jus gentium*. This right of property subsisted so long as the animals were kept, and if they escaped again and recovered their natural liberty, that is, if they got out of sight or could only be pursued with great difficulty, they ceased to be property (Just. *Dig.* 41. 1. 5. 2; *Inst.* 2. 1. 13, 14). By the principles of the Roman law, accordingly, which applied equally to the honeycombs produced by bees, the mere presence of bees or their produce on a person's ground did not make them his, and if another hived the animals that other became their owner, subject, it might be, to proceedings for trespass if he entered the ground in an illegal or wrongous manner. English law is in the main identical with Roman, except that with us the property in bees



which have been hived and reclaimed is in the owner of the ground on which they have swarmed, and not in the captor trespasser (*Blades v. Higgs*, 1865, 11 H. L. 621). And the Charter of the Forest (9 Hen. III. c. 13) expressly authorised every freeman to take honey found in his own woods (cp. 43 Edw. III. c. 24). Reclaimed bees, therefore, are the subject of larceny at common law (*Hannam v. Mockett*, 1824, 2 Barn. & Cress. 934, per Bayley, J.), and trespassing captors cannot make good a right to the bees or honey which they have seized (*Goff v. Kilts*, 1836, 15 Wendell (New York) 550). So even wild bees in a bee tree have been held to belong to the owner of the soil where the tree stands (*Ferguson v. Miller*, 1823, 1 Cowen (New York) 243), and it has also been held that the finding of such a tree on another's property and marking it with the finder's initials does not work a reclamation (*Gillet v. Mason*, 1810, 7 Johnson (New York) 16). *A fortiori*, if a trespasser places a box for bees to hive in on another's ground he cannot maintain trover against a third person for taking bees and honey from the box (*Rexroth v. Coon*, 1885, 15 Rhode Island, 35, where the Court said: "Bees are *feræ naturæ*, and the only ownership in them until reclaimed and hived is *ratione soli*" (as distinguished from *propter industriam*). "This qualified ownership, however, although exceedingly precarious, cannot be changed or terminated by the act of a mere trespasser"). See also *Sarch v. Blackburn*, 1830, Moo. & M. 505, and *Curtis v. Mills*, 1833, 5 Car. & P. 489 (dog cases).

That reclamation is necessary in order to constitute property in bees both Bracton (2. 1. 3) and Blackstone (ii. 392) insist. Bracton says: "Though a swarm lights upon my tree, I have no more property in them until I have hived them, than I have in the birds which make their nests thereon; and therefore if another hives them, he shall be their proprietor; but a swarm which fly from and out of my hive are mine, so long as I can keep them in sight and have power to pursue them; and in these circumstances no one else is entitled to take them." If, accordingly, bees while unreclaimed take up their abode in a tree they belong to the owner of the tree, but if they have been reclaimed and have then taken refuge there they continue in their owner if they can be identified (*Goff v. Kilts*, *supra*). In other words, the facts that they are temporarily astray, and that their owner cannot pursue them without infringing another's rights, do not affect his right of property, and an action will, therefore, lie for their unlawful detention or destruction.

Bees when reclaimed have been held in an American case to be in the same position as other domesticated animals, not rendering their owner liable for accidental injury apart from negligence. In the case in question a horse had been stung to death (*Earl v. Van Alstine*, 1850, 8 Barb. (New York) 630). There does not, however, appear to be any authoritative English decision on the point. Probably a carrier at all events would be excused from liability for injury caused by bees stinging, that being an inherent vice, if no negligence is established against him, according to the principle of *Blower v. Gt. Western Ry. Co.*, 1872, L. R. 7 C. P. 662. See CARRIER. Lastly, in questions of succession, it is laid down in Amos and Ferard, *Law of Fixtures*, p. 259 (3rd ed.), that bees in a hive are considered to be so appropriated to and necessary for the enjoyment of the inheritance that they accompany the land and go to the heir and not to the personal representative, and that the destruction of such animals would be waste.

**Before.**—The meaning of before in s. 40, subs. (6) Bankruptcy Act, 1883, was settled to be "next before," by Cave, J., in *Ex parte Fox*. *In re*

*Smith*, 1886, 17 Q. B. D. 4, subs. (6) directs that the wages or salary of any clerk or servant in respect of services rendered to the bankrupt during four months before the date of the receiving order, not exceeding £50, shall be paid in priority to all other debts.

The four months are those "next" before the date of the receiving order, and where an interim receiver has been appointed, the four months are to be computed from the date of the order appointing the interim receiver.

**Beggars.**—See BEGGING LETTER; VAGRANT.

**Begging Letter.**—1. Every person is, under sec. 4 of the Vagrancy Act, 1824, 5 Geo. IV. c. 83, liable to summary conviction as a rogue and a vagabond, who (i.) *goes about* as a gatherer or collector of alms, i.e. as a habit of life (see *Pointon v. Hill*, 1884, 12 Q. B. D. 306), or (ii.) endeavours to procure charitable contributions of any nature or kind under any false or fraudulent pretence. (See VAGRANT.) It is the common practice of magistrates to convict under (ii.) where the endeavour is made by sending begging letters. On a second conviction the offender is liable to be sent to Quarter Sessions, to be dealt with as an incorrigible rogue (5 Geo. IV. c. 83, s. 5). The same act is punishable on indictment, as an attempt to obtain money by false pretences with intent to defraud.

2. Obtaining money by sending or delivering a lying begging letter is obtaining property by false pretences within sec. 88 of the Larceny Act, 1861, 24 & 25 Vict. c. 96 (see *R. v. Jones*, 1848, 19 L. J. M. C. 162). See FALSE PRETENCES.

**Begin, Right to.**—See BURDEN OF PROOF.

**Behring Sea Fisheries Case.**—This case arose out of the seizure in 1886 by United States revenue cutters of the British schooners *Carolina*, *Onward*, and *Thornton* while at a distance of more than sixty miles from land, on the ground of being unlawfully engaged in the killing of fur-seals. The masters and mates of these vessels were tried before the United States District Court at Sitka, and were condemned to fines and imprisonment. In spite of the protests of the British Government, further seizures were made subsequently, and meanwhile the legality of the seizures was tried and upheld by the Supreme Court of the United States. The question then passed into the domain of diplomacy, and a treaty of arbitration was signed at Washington on February 29, 1892, in which it was agreed that the following points of law should be submitted to arbitration:—

1. What exclusive jurisdiction in the sea now known as the Behring Sea, and what exclusive rights in the seal fisheries therein did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

2. How far were these claims of jurisdiction as to the seal fisheries recognised and conceded by Great Britain?

3. Was the body of water, now known as the Behring Sea, included in

the phrase "Pacific Ocean" as used in the treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Behring Sea were held and exclusively exercised by Russia after the said treaty?

4. Did not the rights of Russia as to jurisdiction and as to the seal fisheries in Behring Sea east of the water boundary, in the treaty between the United States and Russia of March 30, 1867, pass unimpaired to the United States under that treaty?

5. Has the United States any right, and, if so, what right of protection or property in the fur-seals frequenting the islands of the United States in the Behring Sea when such seals are found outside the ordinary three-mile limit?

The Court, composed of Lord Hannen and Sir James Thompson, Canadian Prime Minister (Great Britain); Judge Harlan of the United States Supreme Court and Mr. John P. Morgan, chairman of the Foreign Relations Committee of the United States Senate (United States); Baron de Courcel (France); Count Visconti-Venosta (Italy); and M. Gram (Sweden and Norway), decided on these five points as follows:—

As to the first: "By the Ukase of 1821 Russia claimed jurisdiction in the sea now known as the Behring Sea, to the extent of 100 Italian miles from the coasts and islands belonging to her, but, in the course of the negotiations which led to the conclusion of the treaties of 1824 with the United States, and of 1825 with Great Britain, Russia admitted that her jurisdiction in the said sea should be restricted to the reach of cannon shot from shore, and it appears that, from that time up to the time of the cession of Alaska to the United States, Russia never asserted in fact or exercised any exclusive jurisdiction in Behring Sea or any exclusive rights in the seal fisheries therein beyond the ordinary limit of territorial waters" (Mr. Morgan dissenting).

As to the second: "That Great Britain did not recognise or concede any claim upon the part of Russia to exclusive jurisdiction as to the seal fisheries in the Behring Sea outside of ordinary territorial waters" (Mr. Morgan dissenting).

As to the third, it was decided, "That the body of water now known as the Behring Sea was included in the phrase 'Pacific Ocean' as used in the said treaty"; and "That no exclusive rights of jurisdiction in the Behring Sea, and no exclusive rights as to the seal fisheries therein, were held or exercised by Russia outside of ordinary territorial waters after the treaty of 1825" (Mr. Morgan dissenting).

As to the fourth, the arbitrators unanimously decided, "That all the rights of Russia as to jurisdiction and as to the seal fisheries in the Behring Sea east of the water-boundary in the treaty between the United States and Russia of March 30, 1867, did pass unimpaired to the United States under the said treaty."

As to the fifth: "That the United States has not any right of protection or property in the fur-seals frequenting the islands of the United States in the Behring Sea when such seals are found outside the three-mile limit." To this Mr. Justice Harlan and Mr. J. P. Morgan, the representatives of the United States, did not subscribe.

The procedure of the arbitration was modelled on that in the *Alabama* case (*q.v.*).

Under art. 7 of the treaty of submission it was provided that, "If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of regulations

for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring Sea, the arbitrators shall then determine what concurrent regulations outside the jurisdictional limits of the respective Governments are necessary, and over what waters such regulations should extend."

The decisions on the points of law being favourable to Great Britain, the contingency arose which required the arbitrators to draw up regulations applicable beyond the ordinary jurisdictional limits of territorial waters (*q.v.*). The regulations among other points forbid the taking of fur-seals within a zone of sixty miles round the breeding islands, and the use of certain means of capture, and fix a close season (see Barclay, "Question des Pêcheries dans la mer de Behring" in the *Revue de Droit International*, 1893).

**Being.**—A farming lease contained a clause in which the lessee undertook to repair windows, hedges, ditches, etc.: in the clause the words occurred "the said farmhouse and building *being* previously put in repairs and kept in repairs by the lessor," it was held that the words amounted to an independent covenant on the part of the lessor to put and keep all the premises in repair with the exception of that portion expressly excepted, and which the tenant himself contracted to repair. "The rule of law, as laid down in the case of the *Duke of St. Albans v. Ellis*, 1812, 14 R. R. 361; 16 East, 352, is perfectly clear that in order to constitute a covenant no technical words are necessary. It is sufficient if you can collect from the terms of the instrument that the thing is to be done," per Parke, B., at p. 237 (*Cannock v. Jones*, 1849, 3 Exch. Rep. 233; see also *Muckleston v. Thomas*, 1739, Willes, 146; *Neale v. Ratcliff*, 1850, 15 Q. B. 916; *Martin v. Chue*, 1852, 18 Q. B. 661).

"Being a trader." In sec. 6, subs. 6 of the Bankruptcy Act, 1869, the expression "being a trader" meant a trader at the time the debtor's summons was served, and not at the time when the debt was contracted (*Ex parte Schomberg*, 1874, L. R. 10 Ch. 172); and so "being a trader" in subs. 3 of s. 6, is to be construed in the same way as the same words in subs. 6 of the section, and it means in subs. 3 that the debtor must be actually carrying on a trade at the time when he is alleged to have committed any of the acts therein mentioned as acts of bankruptcy if committed by a trader.

It is not sufficient that he was carrying on a trade at the time when the petitioning creditor's debt was contracted (*Ex parte M'George*, 1882, 20 Ch. D. 697; see *Ex parte Salamon*, 1882, 21 Ch. D. 394, and *In re Dagnall* [1896], 2 Q. B. 407).

**Belief, Information, etc.**—The general rule of English law only to admit a witness to defences and matters within his own knowledge, and to exclude hearsay (*q.v.*) evidence, is subject to certain exceptions.

1. On application for process under the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), and the Summary Jurisdiction Acts, the informant or complainant need not be a person who is able to give evidence as to the commission of the offence alleged. It is enough for him to lay an information or make a complaint on statements made to him by others.

2. On interlocutory proceedings in the High Court affidavits may be filed and used which set forth the belief of the deponent, with the information or facts upon which it is founded (R. S. C. 1883, Order 38, r. 3).

The reason of the rule is that the urgency of the case frequently makes it impossible to obtain other evidence in time to obtain the needful temporary protection of the law. In practice, it leads to an immense amount of verbiage and falsehood.

The rule applies to all proceedings which are interlocutory in substance, and not merely in form (*In re New Callao Co.*, 1882, 30 W. R. 647; *Gilbert v. Endean*, 1878, 9 Ch. D. 259).

A similar practice applies as to hearsay in affidavits in the County Courts. See County Court Rules, 1892, Order 19, r. 2 a.

**Belligerent.**—Literally one waging war, in distinction to a neutral or one not taking part in a war. The term is also used to distinguish the regular forces in warfare from irregular combatants. In international practice it is more commonly restricted to a nation, community, party, or persons carrying on war in a lawful manner, *i.e.* recognised as such by the law of nations.

In civil war, that is to say war between a community seceding from a confederation or State of which it has formed part, the seceders may or may not be considered belligerents according to their ability to resist the power brought to reduce them to submission. They may, moreover, be recognised by neutrals as belligerents, though not by the State against which they have rebelled or from which they have seceded. No precise rule can be laid down by which to judge whether an insurgent or seceder is entitled to recognition as a belligerent.

Great Britain's recognition of the Confederate States as belligerents in the American Civil War of 1861 gave rise to a controversy between the Government of the United States and that of this country. The fact that there was a war in which the forces on both sides were practically balanced would have been a ground of recognition. Moreover, by a proclamation dated April 17, 1861, the President of the Southern States invited applications for letters of marque and reprisal, and the *de facto* Government of the Southern States was in actual possession of a large extent of the American coast. A maritime power was therefore entitled to put itself in the necessity of regularising its position towards the contending parties by recognising their state of belligerency towards each other. The Northern Government, furthermore, by proclaiming (April 19, 1861) a blockade (*q.v.*) of the coasts of the insurgent States, itself recognised the belligerent character of the Southern States, this measure being a direct intimation to neutrals that it claimed to apply the rules of international warfare in the struggle.

France, on the other hand, refused to recognise the Congressists in the Chilian Civil War of 1881 (Rivier, *Principes du Droit des Gens*, 1896, vol. ii. p. 214), though they were the stronger party and were ultimately victorious.

During the present civil struggle in Cuba, several attempts have been made to induce the United States Government to recognise the insurgents as belligerents, on the ground that they have shown themselves a match for the regular forces brought against them.

The character of belligerent, in short, is not so much one of a principle as of fact.

Mr. Hall makes the following distinctions which may be taken to be the general opinion of jurists:—

“So long as a Government is struggling with insurgents isolated in the midst of loyal provinces, and consequently removed from contact with

foreign States, the interests of the latter are rarely touched, and probably are never touched in such a way that they can be served by recognition. • It is not therefore necessary and it is not the practice to recognise communities so placed, however considerable they may be, and however great may be the force at their disposal. When a State is contiguous with a revolted province it may be different. . . . It must be for the foreign State to decide whether its immediate or permanent interests will be better secured by conceding or withholding recognition; and though recognition, except in peculiar circumstances, may expose the conduct of a Government to suspicion, the grant of recognition cannot be said to exceed the legal powers of the State. . . . In the case of maritime war the presumption of propriety lies in the opposite direction. No circumstances can be assumed as probable under which the interests of a foreign State possessed of a mercantile marine will not be affected, and it may recognise the insurgent community without giving just cause for a suspicion of bad faith so soon as a reasonable expectation of maritime hostilities exists, or so soon as acts are done at sea by one party or the other which would be acts of war if done between States, unless it is evidently probable that the independent life of the insurgent government will be so short that the existence of war may be expected to interfere with the interests of the foreign State in a merely transient and unimportant manner" (*International Law*, 4th ed., 1895, pp. 36 and 37).

That a neutral State recognises the state of belligerency of insurgents does not necessarily imply that it recognises their independent political existence, nor does treating the rebellious army in the field according to the laws or usages of war debar the legitimate government from trying the leaders of a rebellion for high treason, and dealing with them accordingly, unless they are included in a general amnesty (art. 154 of Instructions for the government of armies of the United States in the field, 1863).

The question of which kinds of forces engaged in warfare are entitled to the treatment of belligerents is also one of difficulty.

It seems agreed among jurists that all fighting forces in a war are entitled to treatment as belligerents, provided—(1) they are under the command of some responsible leader; (2) they wear some distinctive sign visible at a reasonable distance; (3) they carry their arms openly; (4) they observe the laws and customs of war (see arts. 9 and 10 of Brussels project, 1874, *infra*; and art. 2 of the manual of the laws of war of the Institute of International Law, 1880, *infra*). This will cover *francs tireurs* and other volunteers according to circumstances.

At the Brussels conference it was decided that "the population of a non-occupied territory which at the approach of the enemy takes arms spontaneously to resist the invading troops without having had time to organise themselves" in accordance with the rules mentioned above, are to be considered as belligerents if they respect the laws and customs of war. The Institute of International Law in its manual of the laws of war incorporated this among its rules, but it can hardly be acted upon in actual warfare without relaxing the obligations now laid upon belligerents, and reverting to brutal modes of conducting war which it has been the object of jurists to abolish.

The employment of non-European soldiers in European war has also been a subject of controversy. Thus in the Franco-German War the employment by the French of Turcos was criticised on different sides. The principle applicable seems to be that it is forbidden to employ men not professing the rules of conduct in practice among European communities,

unless they are placed under the command of officers who can enforce obedience to such rules.

Foreign European volunteers are always entitled to treatment as belligerents by the enemy. If owing allegiance to the latter, they are, however, subject to their own national law, in case they are taken prisoners.

In maritime warfare the question of privateering (*q.v.*) is not yet quite settled. One of the articles of the Declaration of Paris (April 16, 1856) declares that "privateering is and remains abolished" (art. 1).

This rule is binding upon those who have signed the declaration. The only States possessing a seaboard which thus far have withheld their acceptance of it, are the United States, Spain, Mexico, and Venezuela (Hall, *International Law*, 4th ed., 1895, p. 717). Other States, therefore, can no longer lawfully grant letters of marque to private vessels, and a signatory State is entitled to treat privateers of a co-signatory State as having no claim to the rights of belligerents.

But what is a privateer? The Prussian Government issued a summons (July 26, 1870) to "all German seamen and shipowners to place themselves and their forces and ships suitable thereto" at the service of the State, under the following conditions, which are important inasmuch as they have served as matter for a construction of the Declaration of Paris:—

"(a) The vessels to be placed at the disposition of the service will be examined and taxed by a commission composed of two naval officers and one naval contractor, as to their capabilities for the intended purpose. In this case the owner receives one-tenth of the price taxed as deposit, whereupon he has to hire the necessary volunteer crews.

"(b) Officers and crews enrolled in this way enter into the Federal navy for the continuance of the war, and wear its uniform and badge of rank, acknowledge its competency, and take oath to the Articles of War. The officers receive a patent of their rank, and the assurance that, in case of extraordinary service rendered, they can, at their request, be permanently established in the navy. Officers and men who are rendered, by this service, unfit to acquire a livelihood, without any fault on their side, receive a pension calculated at the standard of the Royal Federal Navy.

"2. The hired ships sail under the Federal flag.

"3. These will be armed by the Royal Federal Navy, and fitted out for the service allotted to them."

The French Government called the attention of the British Government to this (as it said) "institution which appears to be, under a disguised form, the re-establishment of privateers." "For these vessels," the French Government contended, "to be considered as ships of war, as far as regards their crews, it would be at least necessary that they should be commanded by officers of the Federal fleet, properly commissioned. Now, according to the terms of the order, these officers, like the crews, are engaged by the persons fitting them out; it is true they receive commissions and wear the uniform, but they do not at all belong to the Federal navy, since they are promised to be admitted into it later, on their desire or in case of exceptional services. The crews formed by the owners evidently are not bound by other rules than those which are published for the equipment of merchant vessels; and it follows that the majority of the crews, and in certain ports the officers, might be foreigners—the naval Powers, amalgamated in the Confederation of the North, imposing mostly no condition as to the composition of the crews. Furthermore, this appeal to the initiative of private individuals is an encouragement to the purchase in a foreign country of ships capable of being afterwards transformed, with

more or less facility, into vessels fit for attack, according to the purport of the order" (*Note Verbale* from M. de Lavalette, August 20, 1870).

Earl Granville's answer (August 24, 1870) was that the law officers to whom he had referred the question advised him "that there are, in their opinion, substantial distinctions between the proposed naval volunteer force sanctioned by the Prussian Government and the system of privateering which under the designation of 'la course' the Declaration of Paris was intended to suppress. The law officers say that, as far as they can judge, the vessels referred to in the Notification of the 24th of July will be for all intents and purposes in the service of the Prussian Government, and the crews will be under the same discipline as the crews on board vessels belonging permanently to the Federal navy. This being the case now, and as long as it continues to be so, the law officers consider that Her Majesty's Government cannot object to the decree of the Prussian Government as infringing the Declaration of Paris. Her Majesty's Government will, however, with reference to the Prussian Notification, call the attention of the Prussian Government to the Declaration of Paris, and will express their hope and belief that Prussia will take care to prevent, by stringent instructions, any breach of that declaration."

The British official criterion therefore appears to be that a ship remaining a private ship in all respects saving that a commission is delivered to its captain to capture ships of the enemy, is a privateer; but that a private ship transferred to the State service, and whose captain and crew thenceforward wear the State uniform and badges of rank and take oath to the articles of war, is not a privateer.

The laws of war or rules which have been laid down by jurists for the government of belligerents, though they have not been codified in an international agreement, except by the Convention of Geneva (August 22, 1864) in respect of the treatment and protection of the wounded in battle, and by that of St. Petersburg (Nov. 4-16, 1868) prohibiting the use of certain projectiles, have been on three different occasions authoritatively stated. The first statement was a code called "Instructions for the Government of Armies of the United States in the Field," above referred to, drawn up by Dr. Lieber and adopted by the Government of the Northern States in the American Civil War (April 24, 1863); the second was framed by a conference of general officers of fifteen different States, held at Brussels in July and August 1874; and the third was a project adopted by the Institute of International Law in 1880. The three schemes on the main points are in agreement, being one and all designed to confine warfare as much as possible to a disablement of the armed forces of the enemy.

**Bench Warrant** is a warrant issued by a Court of record (*sedente curiâ*) before which an indictment has been found or articles of the peace (*q.v.*) exhibited for the arrest of the person incriminated. It is only issued when he is not in custody, nor on bail, or when if on bail or recognisance he fails to appear or answer when called. It is not used to compel the attendance of witnesses (*R. v. Crawford*, 1854, 6 Cox C. C. 481). It is not issued until the last day of the sittings of a Court of Assizes or Quarter Sessions, and is signed in a Court of Assize by one judge, at Quarter Sessions by two justices (Pritchard, *Quarter Sessions*, 178; but see Hawk., P. C., bk. 2, c. 27, s. 8).

The authority to issue the warrant is said to be ancient practice (8th Report Crim. L. Commrs. 99), but may perhaps be traced to the words of



34 Edw. III. c. 1 . . . "They (together) shall have power . . . to take and arrest all those that they find by indictment or suspicion and to put them in prison." Hawkins, P. C., bk. 1, c. 27, gives several processes used to compel appearance, namely, *venire facias*, *pone per vadios*, and *capias*. The latter was the more usual in ordinary criminal cases, and similar in effect to a bench warrant, but was addressed to the sheriff. See OUTLAWRY.

On a bench warrant the person named therein may, it would seem, be taken in any county in England (without having the warrant backed; see WARRANT) and conveyed to the prison for the jurisdiction of the issuing Court, to be there detained until trial, unless he is sooner admitted to bail.

A form of warrant is given in Archbold, *Cr. Pl.*, 21st ed., 93; Pritchard, *Quarter Sessions*, 635.

Such warrants are now rarely issued, and instead thereof resort is had to the procedure under sec. 3 of the Indictable Offences Act, 1848, 11 & 12 Vict. c. 42, or in the Queen's Bench Division to the procedure under the Crown Office Rules, 1886, rr. 43, 86, 87, or 48 Geo. III. c. 8, s. 1.

Bench warrants are also said (see Wharton, *s.v.*; Bouvier, *s.v.*) to be or include orders for attachment in case of contempt of court (*q.v.*). But committal orders and writs of attachment (see ATTACHMENT, WRIT OF) are distinct from bench warrants, and it is not the practice to issue any bench warrant for treason, felony, or misdemeanour before indictment found, nor to direct immediate arrest except for gross contempt committed in the face of the Court, in which case the direction is oral, and the offence can be at once and summarily inquired into and recorded, and an order or warrant for fine or imprisonment at once drawn up. If it is for imprisonment it is executed in the High Court by the tipstaff, if the defendant is in Court, without delay; if he is not there, after obtaining the Lord Chancellor's signature to the warrant or order. (See Oswald on *Contempt*, 99, 161-167.)

[*Authorities.*—Steph. *Dig. Cr. Pr.*, art. 195; Russ. on *Crimes*, 6th ed., 639; Archb. *Cr. Pl.*, 21st ed., 93.]

**Benchers.**—See BAR; INNS OF COURT.

**Benefice.**—The word is derived from *beneficium*, which is mediæval Latin = a fief. The word in English, however, is only used of the holding of a property by a spiritual or ecclesiastical person.

(See under ENTRY ON BENEFICE; ADVOWSON; PRESENTATION.)

**Beneficial Occupation.**—In order that the occupier of lands may be liable to be rated in respect of them, his occupation must be beneficial, in the sense in which that term is explained in the authorities cited below, for the rate must be made upon an estimate of the net annual value of the land, that is to say, the rent at which it might reasonably be expected to let from year to year, deducting outgoings (6 & 7 Will. IV. c. 96, s. 1; 32 & 33 Vict. c. 67, s. 4). There was formerly much difficulty in determining when the occupation of lands held for public purposes was beneficial so as to subject the occupiers to rates; but the House of Lords has recently attempted to lay down general principles to meet the difficulty. The leading case is the *London County Council v. Churchwardens of Erith* [1893], App. Cas. 562, in which most of the earlier

authorities were cited and discussed. In that case the following propositions were enunciated by Lord Herschell, who delivered the judgment of the House: "If land is struck with sterility in any and everybody's hands, whether by law or by its inherent condition, so that its occupation is and would be of no value to anyone," it is not rateable. ([1893], App. Cas. at p. 591; see the authorities cited below under *Non-rateable Occupations*); but the question whether pecuniary profit can be derived from the occupation by the occupier is not a criterion which determines whether the premises are rateable (*ibid.*), and "beneficial occupation" does not mean the same thing as occupation from which a profit could be earned (p. 592). It means occupation which is of value to the occupier; and the owner must be considered as a possible tenant in estimating the rental which might, if the owner did not in fact occupy, or were not bound by law to occupy the premises, be obtained from a tenant. It was accordingly held that the London County Council were rateable as occupiers of a pumping station and works which they used as a necessary part of their sewage system in the performance of their statutory duties, and also as the occupiers of their outfall sewers into the Thames. But the rule laid down in a long series of earlier cases that underground sewers are not rateable was left standing, although it appears to be in conflict with the rules above stated (p. 598).

The following are other recent decisions on the subject:—

*Rateable Occupations.*—An advertising stand erected by a builder (*Chappell v. Overseers of St. Botolph* [1892], 1 Q. B. 561); leasehold property of a company in liquidation in possession of a caretaker pending its sale by the liquidator (*In re Blazer Fire Lighter Co.* [1895], 1 Ch. 402); an industrial school of a County Council established under the Industrial Schools Acts (*Durham County Council v. Chester-le-Street Committee* [1891], 1 Q. B. 300); the house occupied by a chief constable (*Showers v. Chelmsford Union* [1891], 1 Q. B. 339); tunnels and a watercourse in and over the land of another in the occupation of a railway company (*Assessment Committee of Holywell Union v. Halkyn District Co.* [1895], App. Cas. 117). (In this case it was held that the test of rateability is not whether the rights granted to the person sought to be rated are corporeal or incorporeal, but whether there is, in fact, an occupation.)

*Non-rateable Occupations.*—A park purchased by a County Council and held under a statute devoting it exclusively to public recreation, the cost of maintenance exceeding any income derivable by the council from it (*London County Council v. Lambeth* [1896], 2 Q. B. 25); docks assigned for the use of a canal company, but not so as to give the company exclusive possession (*Rochdale Canal Co. v. Brewster* [1894], 2 Q. B. 852); railways in a dock, for which the dock company were prohibited from charging tolls (*Hull Docks Co. v. Sculcoates Union* [1895], App. Cas. 136); an easement in gas pipes (*Southport Corporation v. Ormskirk Assessment Committee* [1894], 1 Q. B. 196); an easement of passage over a river bed, and an easement of passage along the towing-path vested in a canal company (*Assessment Committee of Doncaster v. M. S. and L. Ry. Co.* [1895], App. Cas. 133 n.).

**Beneficial Owner.**—This phrase is prescribed by the Conveyancing and Law of Property Act, 1881, s. 7, subss. (1), (A), (B), (C), and (D), to be used in conveyances and mortgages, for the purpose of importing, by implication under the Act's provisions, into the conveyance or mortgage, covenants for title similar in form to those expressly entered into, under

ordinary circumstances, by vendors and mortgagors before the passing of the Act. Such covenants are implied on the part of any person "who conveys and is expressed to convey as beneficial owner." The use of these words in the prescribed manner in a bill of sale of chattels will import the said statutory covenants into the bill of sale by virtue of the statutory implication; and such implication will prevent such bill of sale from being "in accordance" with the form contained in the schedule to the Bills of Sale Act, 1882, which contains no covenants for title; and such bill of sale will therefore be void under the provisions of sec. 9 of the Act (*Ex parte Stanford, In re Barber*, 1886, 17 Q. B. D. 259).

**Beneficiary.**—One who is beneficially entitled to, or interested in property; that is, entitled to it for his own benefit, and not merely as trustee or executor holding it for others. The word is nearly equivalent to the term *cestui-que trust*, which, on account of its cumbersomeness and inexpressiveness, "beneficiary" has begun to supersede in modern law. It is not found in older law. It seems to have followed as a grammatical conclusion from the earlier use in law of "beneficial" and "beneficially," in such phrases as "beneficial occupation," "beneficial owner," "beneficially interested." It is used in the Trustee Act, 1888, s. 6, in dealing with the case of a trustee committing a breach of trust at the instigation of "a beneficiary"; and, again, in the corresponding section of the Trustee Act, 1893. In Roman law, the trustee was commonly called *heres fiduciarius*; and the *cestui-que trust* or beneficiary, *heres fidei commissarius*, which has been translated "fide-committee" (Hallifax, *Anal. of Civil Law*, ch. vi. par. 16). Dr. Story prefers the term "fide-commissary" (Story, *Equity Jurisprudence*, ed. 1886, p. 327 n.). "Beneficiary" is usually applied to those interested in property under wills and settlements; a legatee is called a beneficiary, though a devisee of the legal estate would hardly be so designated. The term is not used for one who has the legal as well as the equitable estate in property, though such a person may be said to be "beneficially interested" in the property, when it is desired to contrast his position with that of a trustee. And he is called the "beneficial owner" (*q.v.*) in the Conveyancing Act, 1881, s. 7.

By the Trustee Act, 1850, s. 37, certain applications to the Court were allowed to be made by any person "beneficially interested." This was held to include a creditor who had obtained a decree for the administration and sale of real estate (*In re Wragg*, 1863, 1 De G., J. & S. 356); but not the committee of a lunatic (*In re Bourke*, 1864, 2 De G., J. & S. 426).

A beneficiary is usually one who is *non sui juris*, as an infant, or a married woman restrained from anticipation, or one who has a limited equitable interest, as a life estate or estate in remainder. If he becomes *sui juris*, and acquires the whole equitable estate in the property, there remains no reason for the continued severance of the legal and equitable estates; and he can require the trustee to execute the necessary legal instruments for vesting the legal estate in him; and so also may several beneficiaries when they have the whole equitable estate between them. A beneficiary solely entitled to the whole equitable interest may call for the legal estate from the trustee even against the express declarations of the trust. Thus, if a fund is given to trustees to accumulate till A. is twenty-four years old, and then to give the whole sum to him, A. may, on becoming twenty-one, call for immediate payment (*Josselyn v. Josselyn*,

1837, 9 Sim. 63; *Saunders v. Vautier*, 1841, 4 Beav. 115). Where two or more beneficiaries are interested in a fund held on trust to be laid out in land and conveyed to them, each one may elect to have his share of the fund at once paid him. But if land is to be sold by trustees, and the proceeds divided among A. B. and C., the trust must be carried out, unless all join in asking for the land itself (*Holloway v. Radcliffe*, 1857, 23 Beav. 163). Although, since the Judicature Act, 1873, the Courts administer law and equity concurrently, and give effect to equitable rights in preference to legal ones where they conflict, yet the equitable owner must still, sooner or later, complete his title by getting in the legal estate, otherwise he may find his interest postponed to the claims of another, who, having an equitable claim upon the property, even although acquired subsequently to his own (if without notice of it), has obtained the legal estate; as, by the rules of equity, in cases of conflicting equitable claims by innocent parties, the holder of the legal estate is preferred. A beneficiary has, generally speaking, the same rights of dealing with his equitable interest as a legal owner. But he cannot act so as to affect the legal estate. If he makes a lease, he may distrain and exercise the rights of landlord, as the tenant is estopped from denying his title (*Blake v. Foster*, 1800, 8 T. R. 487; 5 R. R. 419); but he cannot recover real estate in an action of ejectment brought in his own name. He may, however, require his trustee to allow him to use his name upon giving him a proper indemnity.

Where the beneficiary is entitled for life, it rests with the Court whether he shall be put in possession of the estate (*Bayliss v. Bayliss*, 1844, 1 Coll. 537).

A husband is entitled to curtesy (*q.v.*) in the wife's equitable estate, and under the Dower Act, 3 & 4 Will. IV. c. 105, the wife has dower in her husband's equitable estate.

A beneficiary has a right to have the trust estate held by proper persons as trustees. And if there should be a failure of trustees by death, disclaimer, or otherwise, or if they should be reduced below their proper number, the beneficiaries may have fresh ones appointed, and the estate conveyed to or vested in them.

Where a trustee commits a breach of trust at the instigation or request or consent in writing of a beneficiary, the Court may, notwithstanding that the beneficiary is a married woman entitled to her separate use and restrained from anticipation, impound his or her interest in the trust estate by way of indemnity to the trustee (Trustee Act, 1893, s. 45). This section is in conformity with the previous law, which applied equally whether the beneficiary was entitled to the interest at the time of the breach of trust or acquired it subsequently (*Chillingworth v. Chambers* [1896], 1 Ch. 685).

A beneficiary of real estate is invested with various qualifications and privileges conferred upon the ownership of property by statute law. Thus by 6 Geo. IV. c. 50, he is qualified to serve as a juror, and by 30 & 31 Vict. c. 102, s. 5, he may vote for members of Parliament. But he may not vote for coroners (*R. v. Day*, 1854, 3 El. & Bl. 859).

For further statement of his position, see TRUSTS; also Lewin on *Trusts* and Godefroi on *Trusts*.

**Benefit of Clergy** (*Privilegium clericale*).—The mediæval Church claimed for its clergy exemption from the temporal jurisdiction,

and for the ecclesiastical Courts exclusive cognisance of matters in which the clergy as a distinct estate were concerned. The claim was based apparently on the "*Civis Romanus Sum*" theory, applied by Hildebrand and the popes who claimed to inherit the supreme dominion exercised by the Roman Confessors, and was supported by the Forged Decretals. In England from the Conquest the limits of the claim were in continual dispute, and were the cause of the quarrel between Henry II. and Becket, who appealed as *lege soli* (the customs of the realm) *ad legem poli* (the canonist's confusion of Roman and Jewish law). As the *municipia* preserved Roman law or usage within their bounds, so the clergy claimed adjudication of their rights and duties in the Courts Christian.

The estate of the clergy created a kind of personal statute applicable to all having clerical status, and excluding the territorial customary law applicable to the commons, and the jurisdiction of the temporal Courts. At the same time the privilege of SANCTUARY (*q.v.*, and see ASYLUM) had the effect of creating territorial enclaves within which the writ of the temporal sovereign did not run. The objection of the clergy in early ages to being subjected to barbarian and heathen customs and barbarous punishments, led them to invoke the personal law of the Roman Empire, of which they were citizens; and absurd as the claim is in the view of modern municipal or national law, and absurd as was the procedure of ecclesiastical Courts with respect to criminous clerks, the historical result of the existence of the privilege is shown by Sir J. Stephen to have been very great in the gradual mitigation of punishments for crime (1 *Hist. Crim. Law*, 463-478).

The privilege was conceded in England in cases of treason and felony except those touching the king himself or his royal Majesty (25 Edw. III. stat. 3), and perhaps highway robbery and arson (2 Pollock and Maitland, *Hist. Eng. Law*, 429), but not in matters of contract, or trespass, or misdemeanour (1 Pollock and Maitland, *Hist. Eng. Law*, 423, 429, 430 *n.*). It could be claimed at first only by those who had *tonsuram et vestitum clericalem*, and professed nuns (2 Pollock and Maitland, *Hist. Eng. Law*, 428); occasionally a man after arrest assumed the clerical habit or tonsure to qualify for his clergy (see 1 *Selden Society's Publications*, pll. 43, 135, 197). The privilege was extended in 1530 by the statute *pro clero* (25 Edw. III. stat. 3) to all clerks whether secular or religious (*Armstrong v. Lyle*, 1696, J. Kel. 89, 93).

*Bigamy* (see BIGAMY) were deprived of the privilege until 1547 (1 Edw. VI. c. 12, s. 16) by statutes of 1276 (4 Edw. I. c. 5) and 1344 (18 Edw. III. c. 2) in conformity with a rule of the Council of Lyons (1 Pollock and Maitland, *Hist. Eng. Law*, 428).

Peers, even those who could not read, were given an equivalent privilege in 1547 (1 Edw. VI. c. 12, s. 14), as were women, partially in 1622 (21 Jas. I. c. 6) and fully in 1692 (4 Will. & Mar. c. 9). The privilege was abolished as to commons and clergy in 1827 (7 & 8 Geo. IV. c. 28, s. 6), and as to peers in 1841 (4 & 5 Vict. c. 22). And prior to its abolition many statutes had been passed (Phill. *Ecll. Law*, 2nd ed., 473, 481) creating felonies without benefit of clergy or ousting existing offences from the benefit (for list, see 1 Stephen, *Hist. Crim. Law*, pp. 464, 472). The only relics of the privilege remaining are 18 Edw. III. stat. 3, c. 1, prohibiting impeachment of archbishops or bishops "before our justices" for crime, except by a special command of the sovereign, and the exemption of the clergy from arrest while performing divine service, and from service on any jury.

*Procedure*.—Originally spiritual jurisdiction over a clerk was claimed by the ordinary on arrest. But even prior to 1275 (3 Edw. I. c. 2) the

practice was to require the attendance of the accused clerk, and to hold an inquest of office as to his guilt or innocence. Later the right to claim the privilege was postponed till after conviction and asserted when the convict was called upon to give reason why judgment should not be given (1 Pollock and Maitland, *Hist. Eng. Law*, 425 n.; 2 Co. *Inst.* 164). The prisoner was required to read (in Latin till the Reformation) the "neck verse" (Ps. li. 1), to a clerk appointed by the bishop to attend the Court (see Kel. 18 Ca. 2). Capacity to read was taken as evidence of clerical capacity. But the Court, and not the ordinary, were judges of his capacity to read (J. Kel. 28, 51), and could fine the ordinary if an attempt was made on his behalf to deceive the Court. If he could read he was delivered to the ordinary either to make his purgation (see COMPURGATION) or *absque purgatione*, in which case the Court Christian was forbidden to try him, and he was supposed to be detained for life in the bishop's prison (2 Pollock and Maitland, *Hist. Eng. Law*, 437). After the abolition of purgation in 1576 (18 Eliz. c. 7), the common law Court was empowered to discharge the convicted clerk from custody or to imprison him for not over a year. After 1487 (4 Hen. VII. c. 13) persons who claimed their clergy were branded on the thumb with M. in case of murder, and in case of theft or other offences with T. ("the Tyburn T."), and clergy could not be claimed a second time, except by a clerk in holy orders who could produce his letters of orders or a certificate of the ordination (see 28 Hen. VIII. c. 1; 1 Edw. VI. c. 12, s. 14). The practice at this date is described in old records as *legunt uruntur et deliberantur*, and in the case of *R. v. Ben Jonson*, 1598, *Signatur cum literâ T. et deliberatur*. Its effect was to give a mitigated punishment to first offenders. The necessity of reading was abolished in 1705 (5 Anne, c. 6). In 1717 (4 Geo. I. c. 11) transportation for seven years was made an alternative sentence for branding or whipping in the case of clergyable larcenies, and in 1779 (19 Geo. III. c. 74, s. 3) branding was virtually if not absolutely abolished. While used, it was not infrequently done with a cold iron.

[This subject is fully dealt with in 1 Pollock and Maitland, *Hist. Eng. Law*, 424-440, as to the earliest records; by Hale (2 P. C. 323-390), Blackstone (4 *Com.* 350), and Chitty (1 *Crim. Law*, 666-690) as to the state of the law at their respective periods; and is summed up in 1 Stephen, *Hist. Crim. Law*, 459-472, and from the point of view of Canon Law (Friedberg, *Corpus Juris Canonici* (Leipsic 1879), part ii. pp. 249-255).]

### **Benefit of Survivorship.**—See JOINT TENANCY.

**Benefit Societies, Offences against.**—Societies of this kind, if formed for purposes involving pecuniary benefit (*R. v. Robson*, 1886, 16 Q. B. D. 137), are within the Larceny Act, 1868, 31 & 32 Vict. c. 116, and any member of such society who, in England or Ireland, steals or embezzles property of the society is liable to conviction of larceny or embezzlement, as if he were not a copartner or joint beneficial owner of the property.

Where the society is registered, the property misappropriated is described in criminal proceedings as the property of the trustees (see Friendly Societies Act, 1896, c. 59 & 60 Vict.). Where the society is not registered, the property is described as that of A. B. (a member) and others, under

7 Geo. IV. c. 64, s. 14, and the omission to register the Society does not affect the right to prosecute (*R. v. Tankard* [1894], 1 Q. B. 548).

See FRIENDLY SOCIETY; COLLECTING SOCIETY; INDUSTRIAL AND PROVIDENT SOCIETY; TRADE UNIONS.

**Benevolence.**—The word benevolence first occurs in the year 1473 to describe what were nominally free gifts, but really a new method of unconstitutional taxation imposed by Edward IV. "This year," it is recorded, "the king asked of the people great goods of their benevolence." In the next reign benevolences were abolished by 1 Rich. III. c. 2, which described them as new and unlawful inventions but the king levied them in the following year, and they were afterwards exacted from time to time. In 1622 James I. issued circular letters to the judges and others propounding unto them a voluntary contribution for the aid of his son-in-law in the Palatinate. The judges on circuit were directed to treat with attorneys and others having dependence on the law, and if any out of obstinacy or disaffection should refuse to contribute, to certify their names to the Privy Council. Benevolences were again declared illegal in the Petition of Right in 1628. The complete control of the House of Commons over taxation and expenditure was finally established at the Revolution, and so far has the principle been carried that Todd states that at the present day no person may voluntarily lend money to the Crown, or to any department of State, for public purposes, without the sanction of Parliament, under penalty of a misdemeanour. See the authorities cited in support of this proposition, Todd, vol. ii. p. 197 (2nd ed.).

On the whole subject, see Stubbs, s. 359; Protheroe, *Statutes and Constitutional Documents of James I.*; Todd, *Parliamentary Government in England*, vol. ii.

**Benevolent Construction.**—See PATENTS.

**Bent or Starr.**—Grass growing on the sandhills on the links or sea-shore of Great Britain. By the Starr and Bent Act, 1742 (15 Geo. II. c. 33), penalties are imposed upon persons who, without the consent of the lord or owner, cut any bent which has been planted or set on the north-western coasts of England to hold the sand together so as to prevent it from overflowing adjacent lands or from shifting so as to facilitate inundations of the sea. The Act preserves ancient prescriptive rights, existing in Cumberland, to cut bent or starr.

**Bequeath.**—This word is properly applied only to personalty, but, in a will, it avails to transmit real property: "devise," however (*q.v.*), is the proper word.

**Bermudas,** or Somers Islands, a group of about three hundred islands in the Western Atlantic, forming a British colony. They were included at one time in the Charter of the Virginia Company, and sold by them to the Somers Islands Company, whose charter was annulled in 1684. The laws are English in their origin. The Legislature consists of the

Governor, the Legislative Council, and the House of Assembly. The judiciary includes the Chief Justice and two assistant judges. Appeals from the Court of General Assize to the Queen in Council are regulated by local Act, No. 382 of 1876. See PRIVY COUNCIL.

**Berne Convention.**—An International Convention entered into between Great Britain, Belgium, Germany, France, Spain, Switzerland, Italy, Norway, Tunis, Liberia, and Hayti, for the creation of an international union for the protection of literary and artistic works (*q.v.*). It was signed at Berne on September 9, 1886. (See for history of the Convention and the movement for protection of international copyright, Poincard, *Etudes de Droit International Conventionnel*, Paris, 1894.) A statute, 49 & 50 Vict. c. 33, has been passed for carrying into effect the provisions of the Convention, the principal of which are shortly as follows:—

The Convention applies to books, prints, lithographs, sculpture, dramatic pieces, musical compositions, paintings, drawings, photographs, and other works of literature and art (art. 4).

Copyright is allowed, in every country which is a party to the Convention, to the works of authors of all other countries which are also parties to the Convention. The duration of such copyright, however, cannot be greater than that to which the author is entitled in his own State, nor can it be more than the State granting it allows by law to its own subjects (art. 2).

The right of translation is vested solely in the author of the original work, unless within a period of ten years the author has not himself translated or authorised a translation of the work (art. 5).

The reproduction of a work with merely superficial changes made with the view of presenting the work as an original is illegal (art. 10).

Newspaper articles cannot be admitted to international copyright unless reproduction shall have been expressly prohibited by the original author or publisher. No articles upon topics of the day, politics, or current news, however, are subject to this last restriction (art. 7).

An international union for the protection of literary or artistic works was established by the Convention, with its central office at Berne, under supervision of the Swiss Government. A similar union, with its central office at Berne, has been established for industrial property (*q.v.*, and see PATENTS). See also COPYRIGHT.

**Berwick-upon-Tweed.**—As a matter of history, Berwick-upon-Tweed, though part of the dominions of the English Crown, was not part either of England or of Scotland, and is a separate county of a town corporate, having a sheriff of its own (6 & 7 Will. IV. c. 103, s. 6), and is not part of Northumberland (*Mayor of Berwick-on-Tweed v. Shanks*, 1836, 3 Bing. 459).

By 20 Geo. II. c. 42, s. 3, it is declared that where the kingdom of England or that part of Great Britain called England has been or shall be mentioned in an Act of Parliament, it has been and shall be deemed and taken to comprehend and include the town of Berwick-upon-Tweed.

For parliamentary purposes it forms part of the Berwick-on-Tweed Division of Northumberland (48 & 49 Vict. c. 23, s. 2, schd. 1, 7). But the mayor is not, as in other municipal boroughs, the returning officer at parliamentary elections (45 & 46 Vict. c. 50, s. 244 (1)).



For purposes of militia it is deemed part of Northumberland (42 Geo. III. c. 90, s. 149; 17 & 18 Vict. c. 105, s. 50; 52 Geo. Geo. III. c. 38, s. 158), and its quotas are fixed accordingly. (See 4 St. R. & O. Revised, *tit. MILITIA*.)

For ecclesiastical purposes it is part of the province of York and diocese of Newcastle (see order constituting diocese, 1 St. R. & O. Revised, p. 442), but in Orders in Council for public fasts or thanksgivings, it is enumerated as distinct from England and Wales.

For purposes of criminal justice it is subject to the criminal laws of England (*R. v. Cowle*, 1759, 2 Barr. 824, where the history of the borough is fully considered).

The borough has a separate Court of Quarter Sessions and separate police force, but for the purposes of criminal trials at assizes it is treated as adjoining to Northumberland, and assize cases are tried at the Northumberland Assizes (45 & 46 Vict. c. 50, s. 188, and schd. 6), and no special commission of assize for the borough is now issued. It is expressly included within the scope of the Indictable Offences Act, 1848, 11 & 12 Vict. c. 42, s. 32, and the Summary Jurisdiction Acts, 11 & 12 Vict. c. 43, s. 37.

The civil law of Berwick-on-Tweed originally rested on the law of Scotland as modified by local customs (Hale, *Hist. Com. Law*, 257-265); but, subject to these customs, its law is now that of England.

The Fines and Recoveries Act, 1833, was applied by 6 & 7 Will. IV. c. 103, s. 6. For purposes of civil procedure and the trial of civil actions, the town is treated as part of England.

For the purposes of the Local Government Acts, 1888 and 1894, it is treated as situate within the county of Northumberland.

For purposes of salmon fishery it is under a special Act. See Report of Tweed and Solway Fishery Commissioners, Parl. Pap., 1896 (8086, 8087).

**Beset.**—Under sec. 7 of the Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict. c. 86, it is an offence, punishable on summary conviction, for anyone wrongfully and without legal authority, except a seaman or apprentice to the sea service (*Kennedy v. Cowie* [1891], 1 Q. B. 771), to watch or *beset* the house or place where another resides or works or carries on business or happens to be, or the approach to such house or place, with a view to compel him to abstain from doing or to do any act which he has a legal right to do or abstain from doing.

The accused may elect to be tried on indictment (38 & 39 Vict. c. 86, s. 9). On committal, bail is obligatory. The expenses of the prosecution fall within 42 & 43 Vict. c. 49, s. 17. If summarily tried, he can appeal to Quarter Sessions (38 & 39 Vict. c. 86, s. 12). (See *APPEALS to Quarter Sessions*).

The penalty is imprisonment, with or without hard labour for not over three months, or fine not exceeding £20. The justices can also award costs (11 & 12 Vict. c. 43, s. 18; 42 & 43 Vict. c. 49, s. 8).

Besetting does not include picketing, when that goes no further than to attend at or near a place to obtain or communicate information (*Lyons v. Wilkins* [1896], 1 Ch. 811; *Ex parte Wilkins*, 1895, 64 L. J. M. C. 221).

It has been held (*R. v. Mackenzie* [1892], 2 Q. B. 529) that a conviction must set out the acts which the molested person had a right to do, etc., and which he was prevented from doing, etc.; but when the exact words of the statute are followed on the conviction it will apparently be good (see *Ex parte Wilkins, ubi supra*).

**Best Evidence.**—See EVIDENCE.

**Bestiality.**—See ABOMINABLE CRIME.

**Betaches.**—An obsolete term, apparently connected with the Saxon *beteach*, to entrust with, denoting laymen having the use of glebe lands. *Et Hibernicos . . . more Anglicorum pertractari mandamus jure nostro et aliorum dominorum in bonis et catallis natorum, qui vulgariter in illis partibus Betaches nominantur* (Par. 14 Edw. II. p. 2).

**Betting.**—1. Betting is a form of wagering contract in which money or money's worth is made payable by the parties on the result of an uncertain event, usually a game or sport. Such a contract was not at common law held in England to be either illegal or void as being against the policy of the law, or as a *nudum pactum*. See GAMING.

2. Certain forms of betting in streets or public places are punishable under the Street Betting Act, 1873, 36 & 37 Vict. c. 38. Sec. 3 of that Act extends the provisions of the Vagrancy Act, 1824, 5 Geo. IV. c. 83, to persons playing or betting, by way of wagering or gaming in any street, road, highway, or other open and public place, or in any open place to which the public have or are permitted to have access, including a railway carriage (*Langrish v. Archer*, 1882, 10 Q. B. D. 44), with any table or instrument of gaming, or any coin, card, token, or other article used as an instrument or means of such wagering or gaming at any game of chance. Such persons are liable to conviction and punishment as rogues and vagabonds, or may be subjected to a penalty for a first offence not exceeding 40s., and for a second or subsequent offence not exceeding £5. The Act (which repealed and in substance re-enacted 31 & 32 Vict. c. 52) has been held to apply only to games or pretended games of chance, and not to mere betting (*Kidgway v. Farndale* [1892], 2 Q. B. 309), which has led to the framing of the by-laws next to be dealt with. It appears to apply to betting by the *puri mutuel* on a racecourse (*Toller v. Thomas*, 1871, L. R. 6 Q. B. 524), but not to prepaid betting on a dog-race (*Hirst v. Molesbury*, 1870, L. R. 6 Q. B. 130).

Under the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, ss. 23, 24, as extended to administrative counties by the Local Government Act, 1888, 51 & 52 Vict. c. 41, s. 16, county and borough councils may make by-laws for the punishment of betting in public places. County Council by-laws under these powers have no effect in boroughs (51 & 52 Vict. c. 41, s. 16). A by-law has been held valid which provided that any person who shall frequent or use any street or other public place within the borough for the purpose of book-making, or betting, or wagering, or agreeing to bet or wager with any person, shall be liable to a penalty not exceeding £5 (*Burnett v. Berry* [1896], 1 Q. B. 641). The meaning of the term "frequent" is now under consideration in *Wickham v. Ashe*, Q. B. D. [1897]. As to its meaning in other Acts, see *Clarke v. R.*, 1884, 14 Q. B. D. 92, and 34 & 35 Vict. c. 112, s. 15; 54 & 55 Vict. c. 69, s. 7.

A by-law made by a County Council has also been held good which imposed a penalty on any person who, together with any other person or persons, assembles in any street or public place for the

purpose of betting (*Goodwin v. Walker*, 1896, 13 T. L. R. 367; 60 J. P. 309).

Within the administrative county of London, including the city of London, betting in streets is regulated by sec. 23 of the Metropolitan Streets Act, 1867, 30 & 31 Vict. c. 134, which provides that any three or more persons assembled together in any part of a "street" within the Metropolis for the purpose of betting shall be deemed to be obstructing the street, and each of such persons shall be liable on summary conviction to a penalty not exceeding £5. A constable from the city or metropolitan police force may arrest without warrant any person who commits such offence in his view and within his district. By sec. 3, street includes highways and public places, whether thoroughfares or not, and "public places" includes all parks, gardens, and possessions managed by the Commissioners of Works under the Crown Lands Act, 1851, 14 & 15 Vict. c. 42.

3. As to betting houses and betting on licensed premises, see BETTING HOUSE.

4. The publication of certain advertisements as to betting is illegal under the Betting Act, 1874, 37 & 38 Vict. c. 15, but the Act applies only to bets or wagers within the Betting House Acts (*Cox v. Andrews*, 1883, 12 Q. B. D. 126; *Caminada v. Hulton*, 1891, 60 L. J. M. C. 116; *Sagar v. Stoddart* [1895], 2 Q. B. 474). See BETTING HOUSE.

5. Under the Betting and Loans (Infants) Act, 1892, 55 & 56 Vict. c. 4, introduced by Lord Herschell, every person is guilty of a misdemeanour who, for the purpose of earning commission, reward, or other profit, sends or causes to be sent to any person whom he knows to be an infant any circular, notice, advertisement, letter, telegram, or other document which invites, or may reasonably be implied to invite, the person receiving it to make any bet or wager, or to enter into or take any share or interest in any betting or wagering transaction, or to apply to any person or at any place with a view to obtaining information or advice for the purpose of any bet or wager, or for information as to any race, fight, game, sport, or other contingency upon which betting or wagering is generally carried on.

The offence is punishable on indictment by imprisonment, with or without hard labour, for not over three months, or fine not exceeding £100, or both, and on summary conviction by imprisonment, with or without hard labour, for not over one month, or fine not exceeding £20, or both. An appeal lies against a sentence of imprisonment on summary conviction (42 & 43 Vict. c. 43, s. 19). See APPEALS (*to Quarter Sessions*). The offence is triable on indictment at Quarter Sessions. See QUARTER SESSIONS. If the defendant thinks fit, he or she, or her husband or his wife, may be called as a witness (s. 6).

Where the document on which the prosecution is founded is sent to a person at a university, college, school, or other place of education, the recipient is presumed to be, and to be known by the defendant to be, an infant, but he may prove that he had reasonable cause for believing the recipient to be of full age (s. 3). If the document names or refers to anyone as a person to whom a payment may be made, or from whom information may be obtained for the purpose, or in relation to betting or wagering, he is to be deemed to have sent, or caused to be sent, the document, unless he proves the contrary (s. 1 (2)).

6. Welshing, *i.e.* betting for ready money, where the betting-man does not mean to pay if he loses, has been held to be larceny by a trick (*R. v. Buckmaster*, 1887, 20 Q. B. D. 182).

**Betting House.**—1. No penalty attached at common law to the keeping of a betting house, unless it was so conducted as to create a public nuisance. See DISORDERLY HOUSE.

2. A common gaming house was indictable as a nuisance at common law (*R. v. Rogier*, 1823, 1 Barn. & Cress. 272; 25 R. R. 393); and keeping a common gaming house for unlawful games was rendered punishable in 1541 by 33 Hen. VIII. c. 9, ss. 8, 9, which is still in force and use. The common law and this Act and subsequent legislation until 1853 did not apply to mere betting houses, though the Gaming Act, 1845, 8 & 9 Vict. c. 109, dealt with bets as evidence in certain cases of the keeping of a common gaming house.

3. Betting houses are now regulated by the Betting House Act of 1853, 16 & 17 Vict. c. 119, and sec. 17 of the Licensing Act, 1872, 35 & 36 Vict. c. 94. Over the meaning, intent, and effect of these Acts there have been long disputes, not yet finally settled. When the Act of 1853 was introduced into Parliament it was stated to be meant only to suppress ready money betting (129 Hansard, *Parl. Deb.* 3rd series, 87), and, to limit its enacting parts, reference is often made to its preamble and to its parliamentary career—the latter is a clue to interpretation which the Courts are not in strictness entitled to follow (*R. v. Hertford College*, 1873, 3 Q. B. D. 693, 707). Before explaining the contents of this and subsequent Acts, it is necessary to point out that the statutes are ill-penned, and the decisions thereon have produced much conflict as to the meaning and application of the Acts.

Sec. 1 deals with two distinct offences (*Bond v. Plumb* [1894], 1 Q. B. 169). It forbids opening, keeping, or using any house, office, room, or place (1) for the purpose of the owner, occupier, keeper thereof, or any person using the same, or any person procured or employed by him or acting on his behalf, or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto; (2) for the purpose of any money or valuable thing being received by any such person in consideration, (a) for any express or implied agreement, to pay or give any money or valuable thing on any event or contingency of, or relating to, a horse-race or other race, fight, game, sport, or exercise; or (b) for securing the paying or giving by any other third person of any money or valuable thing on such an event or contingency.

The Act goes on (ss. 1, 2) to declare such house, etc. to be a common nuisance and contrary to law, and to be a common gaming house within the Gaming Act, 1845 (8 & 9 Vict. c. 109). The keeping of such a house is therefore now a statutory misdemeanour, punishable by imprisonment with or without hard labour for a term not fixed by statute, or by fine without statutory limit (*R. v. Brown* [1895], 1 Q. B. 119; 3 Geo. IV. c. 114), and falls within the provisions of the Disorderly Houses Act, 1751, 25 Geo. III. c. 36, and the Vexatious Indictments Act, 1859, 22 & 23 Vict. c. 17.

4. The following acts—(a) the opening, keeping, or use by any of the persons enumerated of any place for any of the purposes forbidden by sec. 1; (b) the wilful and knowing permission by the owner or occupier of any house of such forbidden use by another; and (c) assistance in the care, management, or conduct of the forbidden business—are also offences punishable on summary conviction by a penalty not exceeding £100, or by imprisonment with or without hard labour for not over six months (s. 3, as modified by 47 & 48 Vict. c. 43, Sched.). User on a single occasion is sufficient to warrant conviction (*Hawke v. Dunn*, 1897, 13 T. L. R. 281).

The defendant may elect to be tried on indictment, in which event the costs of prosecution are payable as in cases of felony (42 & 43 Vict. c. 49,

s. 17). But the indictment need not state the election of the defendant, nor is the prosecution confined in its preparation to the exact charge on which the election was made, provided that the provisions of 22 & 23 Vict. c. 17, and 30 & 31 Vict. c. 35, s. 1, as to vexatious indictments, are not disobeyed (*R. v. Brown* [1895], 1 Q. B. 119).

The prosecution, if they choose, can proceed in the first instance as for an indictable offence, and whether this course is taken at the election of prosecution or defence the provisions of the Disorderly House Act, 1751, and the Gaming Act, 1845, as to evidence, etc. apply. The indictment can be tried at county or borough Quarter Sessions (*R. v. Charles*, 1861, 31 L. J. M. C. 69); and no *certiorari* is allowed except at the instance of the prosecution (*R. v. Davies*, 1794, 5 T. R. 626; 2 R. R. 683).

The direct or indirect receipt by any of the persons enumerated as concerned in the forbidden business, of any money or valuable thing as a deposit on any bet within sec. 1, is an offence punishable on summary conviction by a Petty Sessional Court, by fine not exceeding £50, or imprisonment for not over three months (Act of 1853, s. 4, 47 & 48 Vict. c. 43, Sched.), and any person depositing money, etc., under circumstances which come within sec. 4 of the Act of 1853, can recover it by action under sec. 5.

5. The term "other place" has been held not to be limited to houses or rooms, but to include any fixed or ascertained spot used for the forbidden purposes, and any area of enclosed ground, whether covered or uncovered, which is known by a name and is capable of reasonably accurate description; not necessarily defined by marks and bounds (*Hawke v. Dunn* [1897], 13 T. L. R. 281). In particular it has been held to include grounds used for cricket and athletics (*Haigh v. Sheffield*, 1875, L. R. 10 Q. B. 102), or pigeon shooting (*Eastwood v. Mellor*, 1874, L. R. 9 Q. B. 440), to the bar or tap-room in a public-house (*R. v. Preeedy*, 1888, 17 Cox C. C. 433; *Hornsby v. Raggett* [1892], 1 Q. B. 20), to a roofless wooden structure (*Shaw v. Morley*, 1868, L. R. 3 Ex. 137), to a bookmaker's stool and umbrella (*Bowes v. Fenwick*, 1874, L. R. 9 C. P. 339), or a box stand (*Galloway v. Maries*, 1882, 8 Q. B. D. 275), and to a pit heap (*McInany v. Hildreth*, 1897, 13 T. L. R. 284), and to Tattersall's ring at a racecourse (*Hawke v. Dunn*, 1897, 13 T. L. R. 281), but not to a resort under a tree (*Doggett v. Cattams*, 1865, 34 L. J. C. P. 159), nor the enclosure or reserved part of a racecourse (*Snow v. Hill*, 1884, 14 Q. B. D. 588). This last case, however, is distinguished, if not overruled by *Hawke v. Dunn*. Whether an unenclosed area can be an "other place" is at present undetermined.

"Betting" in the Act means making the contract, and does not include payment of bets (*Bradford v. Dawson* [1897], 1 Q. B. 307).

"Resorting" means physically resorting, and does not include communications by post, telegraph, or telephone (*R. v. Brown*, L. R. [1895], 1 Q. B. 119). But it is not necessary to prove that bets should be actually made in the place (s.c. and *R. v. Worton*, *infra*), nor that any actual resorting should be proved, if the evidence shows the place to have been kept for the purpose of betting with persons resorting thereto. The house, etc. may be used even if the receipt of money takes place outside (*R. v. Worton* [1895], 1 Q. B. 227). The decisions in *Whitehurst v. Fincher*, 1890, 17 Cox C. C. 70; *Davis v. Stephenson*, 1890, 17 Cox C. C. 73; and *Snow v. Hill*, 1884, 14 Q. B. D. 588, do not appear to be quite consistent with this case (see *Hawke v. Dunn*, *ubi supra*).

Genuine clubs, in which the members bet among themselves, do not fall within the Act (*Downes v. Johnson* [1895], 2 Q. B. 203); and the receipt or holding of stakes deposited to abide the event, and to be paid to the

winner of any race or lawful sport, game, or exercise, or to the owner of a horse engaged in a race, is expressly excepted from the Act of 1853 (s. 6).

6. The holder of a justice's licence or certificate for the sale of intoxicants is guilty of an offence against sec. 17 (1) of the Licensing Act, 1872, if he opens, keeps, or uses his premises, or suffers them to be opened, kept, or used for betting, or for the receipt of stakes or bets; and he may be fined on a first conviction not over £10; on a second or subsequent conviction not less than £1 nor over £20, with, in either case, imprisonment without hard labour in default of distress (35 & 36 Vict. c. 94, s. 17; 42 & 43 Vict. c. 43, ss. 5, 17), and the conviction may be endorsed on the licence. The publican may be proceeded against alternatively under the Act of 1853 (see *Sims v. Pay*, 1888, 58 L. J. M. C. 39; 35 & 36 Vict. c. 94, s. 53); and his conviction under the Act of 1872 in no way affects the liability of the bookmaker using his house (*M'William v. Dawson*, 1891, 56 J. P. 182).

The licensee has been held liable if the betting is allowed by the knowledge, connivance, or carelessness of a manager or servant left in charge of the premises (*Bond v. Evans*, 1888, 21 Q. B. D. 249; *Somerset v. Hart*, 1884, 12 Q. B. D. 360). But a manager or servant is said not to be acting within the general scope of his employment in allowing gaming (*Commissioners of Police v. Cartman* [1896], 1 Q. B. 658).

7. Advertisements as to betting are regulated by sec. 7 of the Betting House Act, 1853, and by the Betting Act, 1874, 37 & 38 Vict. c. 15, sometimes called Anderson's Act.

It is an offence punishable on summary conviction—

(1) To exhibit or cause to be exhibited any advertisement that any house, office, room, or place, is open, kept, or used—

(a) For the purpose of betting in the manner prohibited by sec. 1 of 16 & 17 Vict. c. 119 (*supra*).

(b) For the purpose of exhibiting betting lists;

(c) To induce any person to resort thereto for the purpose of betting.

(2) On behalf of the owner, etc. of any such house, etc., to invite any person to resort thereto for the purpose of betting (16 & 17 Vict. c. 119, s. 7).

(3) To send, exhibit, or publish any letter, circular, telegram, placard, hand-bill, card, or advertisement (a) by which it is made to appear that any person within or without the United Kingdom will on application give information or advice with respect to any bet, or will make any bet within the Act of 1853; (b) with intent to induce any person to apply to any house, etc., or to any person with the view to obtaining information or advice for the purpose of any such bet; (c) inviting any person to make or take any share in or in connection with such bet (37 & 38 Vict. c. 15).

The Acts do not render it illegal to advertise racing tips, unless they are advertised with respect to a betting office which is within the Act of 1853 (*Cox v. Andrews*, 1883, 12 Q. B. D. 126).

The penalty for all these offences is a fine not exceeding £30, or imprisonment for not over two months with or without hard labour (16 & 17 Vict. c. 119, s. 7; 37 & 38 Vict. c. 15).

8. An appeal lies to Quarter Sessions against any conviction under the Acts of 1853, 1872, and 1874 (16 & 17 Vict. c. 119, s. 13; 35 & 36 Vict. c. 94, s. 75; 37 & 38 Vict. c. 15; 42 & 43 Vict. c. 49, s. 31) (see APPEALS (to Quarter Sessions)); but the summary conviction or an adjudication by the Quarter Sessions on an appeal is not removeable by *certiorari* (q.v.) (16 & 17 Vict. c. 119, s. 14).

The penalties imposed under the Acts of 1853 and 1874 are recoverable by distress. Half is payable to the informer and the rest to the poor

rate (16 & 17 Vict. c. 119, ss. 8 and 9). This provision appears to apply to the metropolitan police district, and to override sec. 47 of the Metropolitan Police Courts Act, 1839, 2 & 3 Vict. c. 71. The decision to the contrary in *Wray v. Ellis*, 1858, 28 L. J. M. C. 45, on the Gambling House Act of 1854, appears to be erroneous and inapplicable (see *R. v. Titterton* [1895], 2 Q. B. 61).

If no sufficient distress is found, the offender can be committed to prison in default, under the Summary Jurisdiction Acts (11 & 12 Vict. c. 43; 42 & 43 Vict. c. 49, s. 21; 47 & 48 Vict. c. 43, s. 5).

The provisions of 20 & 21 Vict. c. 43, and sec. 33 of the Summary Jurisdiction Act, 1879, and the Summary Jurisdiction Rules of 1886, authorise appeal to the High Court on questions of law by a special case stated by a Petty Sessional Court.

9. A house (including a licensed house (*Anderson v. Hume*, 1882, 46 J. P. 825)) suspected of being a betting house may be entered and searched under a warrant granted by one justice on information on oath that the house is suspected of being a betting house (*Lee v. Gold*, 1880, 44 J. P. 395). All persons found there may be arrested and searched, and all betting lists and betting cards and other documents seized (16 & 17 Vict. c. 119, s. 11). The procedure to be followed on arrest and seizure, etc., is indicated in *Blake v. Beach*, 1876, 45 L. J. M. C. 111, and *R. v. Johnson*, 1896, 31 L. J. 703. In the metropolitan police district the warrant may be granted by a commissioner of police on the report of a superintendent of police (s. 12) (see 2 & 3 Vict. c. 47, s. 48). See also GAMING; GAMBLING HOUSE.

[For further authorities, see Stutfield on *Betting*, 3rd ed., 1892; Coldridge and Hawksford, *Law of Gambling*; Oliphant on *Horses, Gaming, and Wagers*, 5th ed., 1896.]

**Between.**—When parties join in a legal instrument in different capacities it is expressed as being made “between” the parties.

The converse case is a unilateral instrument, such as a deed poll, in which this division of parties does not appear.

The use of the word in expressing a difference, or severance, of interests, is also shown in its employment for indicating that grantees are intended to take with distinct interests as tenants in common. If, e.g., a legacy, or residue, is given to A. and B. “between” them, then they take as tenants in common (*Lashbrook v. Cock*, 1816, 2 Mer. 70; 16 R. R. 144; *A.-G. v. Fletcher*, 1871, L. R. 13 Eq. 128). And though a simple bequest to A. and B., without more, is a joint tenancy (William’s *Executors*, 9th ed., p. 1326), a bequest to A. and B. “jointly and between them” is a tenancy in common (*Perkins v. Baynton*, 1781, 1 B. C. C. 118, and William’s *Executors*, *supra*).

The distinction of parties in an instrument is explained in *Dawes v. Tredwell*, 1881, 18 Ch. D. 354, by Jessel, M. R.: “The rule is that where you have such words as ‘It is hereby agreed and declared between and by the parties,’ that some one will do an act, or make a payment, and that some one is a party to the deed, it is a covenant by him with the others, not a covenant by all of them. If, therefore, we find that no act is to be done, except by one of the parties, these words only amount to a covenant by that one party with the others.”

**Beverches.**—These are defined by the authorities to be bedworks or customary services performed at the lord’s request by his inferior tenants.

For example, it appears that among the services which the abbot of Rading was entitled to exact from the tenants at Blebury were *duas precarias carrucarum per annum, quæ vocantur Beverches et cum qualibet carruca duos homines qualibet die* (Cartular. Rading, MS. f. 223).

**Bias.**—No man can lawfully be a judge in his own cause. This is a clear rule of law as well as of natural equity (*Day v. Savadge*, 1615, Hob. 87), and it is rigorously enforced. Hence, if a judge has any interest in the subject-matter of the litigation before him, all proceedings will be stayed or set aside unless the parties, with full knowledge of the facts, have waived the objection. If the proceeding be in an inferior Court, a writ of prohibition will issue on proof that the Court or any member of it is interested. If one justice has the least pecuniary interest in the matter before the bench at the time an order is made, that order will be quashed (*R. v. JJ. of Suffolk*, 1852, 21 L. J. M. C. 169; *R. v. JJ. of Surrey*, 1852, *ibid.* 195; *R. v. Farrant*, 1887, 20 Q. B. D., at pp. 60, 61). The whole bench is disqualified, although there was a majority in favour of the decision without counting the vote of the interested justice (*R. v. JJ. of Hertfordshire*, 1845, 6 Q. B. 753). The mere fact that one of the justices is a member of the class in whose pecuniary interests the proceedings are taken is sufficient (*R. v. Huggins* [1895], 1 Q. B. 563; but see *R. v. McKenzie* [1892], 2 Q. B., at p. 523). And if an interested justice takes any part at all in the proceedings, it does not matter how small a part he takes (*R. v. JJ. of Hertfordshire*, *supra*; *R. v. JJ. of Suffolk*, *supra*; *R. v. Meyer*, 1875, 1 Q. B. D. 173; *Ex parte Akkeredyk* [1892], 1 Q. B., at p. 196). So, the least pecuniary interest in the judge of a Court will disqualify his deputy (*Brookes v. Earl of Rivers*, 1669, Hard. 503). This is so even where the person interested is only nominally judge, and the deputy always presides over the Court (*ibid.*). Thus, where a resident in Birmingham had his house set back in the course of some town improvements, and claimed from the town council compensation, which was duly assessed by a jury before the under-sheriff for the county, the whole proceedings were subsequently quashed, because it transpired that the sheriff had property in respect of which he was liable to be rated under the Birmingham Town Improvements Act, and was thus interested to an infinitesimal degree in keeping down the amount of the compensation; and this, although the sheriff knew nothing at all about the matter, the under-sheriff having, as usual, acted alone (*R. v. Sheriff of Warwickshire*, 1855, 24 L. T. (old series) 211).

The mere fact that a justice is interested as a ratepayer in the result of the application made to the Court, is thus sufficient at common law to disqualify him from acting (*R. v. Gaisford* [1892], 1 Q. B. 381). But various Acts of Parliament have removed this disability in certain special cases. Thus, a member of the town council of a borough may act as a justice in matters arising under the Public Health Act, 1875 (see s. 258 of that Act). A justice for any county, city, or borough may in petty or special sessions hear an appeal against any parish rate to which he is himself chargeable (16 Geo. II. c. 18, s. 1; *R. v. Bolingbroke* [1893], 2 Q. B. 347; *Ex parte Overseers of Workington* [1894], 1 Q. B. 416). As to the rule in such cases, see *R. v. Handsley*, 1881, 8 Q. B. D. 383, disapproving the decision in *R. v. Gibbon*, 1880, 6 Q. B. D. 168.

But such sections are strictly construed (*R. v. Sheriff of Warwickshire*, 1855, 24 L. T. (old series) 211; *R. v. Henley* [1892], 1 Q. B. 504).

So, too, the proceedings will be invalid if the judge (or any one of the



justices) be himself the prosecutor, or one of the prosecutors, in the case on which he adjudicates, for here again he is acting as judge in his own cause. This will be so whenever the judge or justice is a member of the body which institutes the proceedings, although he has taken no active part in advising or conducting the prosecution (*R. v. Milledge*, 1879, 4 Q. B. D. 332; *R. v. Lee*, 1882, 9 Q. B. D. 394; *R. v. Gaisford* [1892], 1 Q. B. 381; *R. v. Henley*, *ibid.* 504; see, however, *R. v. JJ. of Huntingdon*, 1879, 4 Q. B. D. 522; and *R. v. Dublin County JJ.*, 1894, 2 Ir. R. 527). In the case of *R. v. JJ. of Great Yarmouth*, 1882, 8 Q. B. D. 525, several appeals against the same poor-rate came before the same special sessions, and the chairman of the magistrates was himself an appellant in one. He took part in the decision of all the cases except his own. When his own case was called on, he left the bench and went to the body of the Court and conducted the case himself. It was held that he was disqualified from acting as a justice, and all the orders were quashed. By the express terms, however, of the Church Discipline Act, 1840, a bishop may hear and determine a charge against a clerk in orders so long as he be not patron of any preferment held by the party accused, although his secretary be the nominal prosecutor (*R. v. Bishop of St. Albans*, 1882, 9 Q. B. D. 454).

But where no member of the Court is either pecuniarily interested, or is actually or virtually a prosecutor in the case, it is difficult to prove bias. "Favour shall not be presumed in a judge": *per cur.* in *Brookes v. Earl of Rivers*, 1669, Hard. 503, a passage cited with approval in *R. v. Dean of Rochester*, 1851, 17 Q. B., at p. 31; 20 L. J. Q. B., at p. 475. Still a judge may have a decided bias in favour of one of the parties that are about to appear before him, although he neither is a prosecutor nor has the least pecuniary interest in the subject-matter of the litigation. But it must be a real bias; a mere possibility of bias will not be sufficient to induce the Court to interfere (*R. v. Rand*, 1866, L. R. 1 Q. B. 230, 233; *R. v. Meyer*, 1875, 1 Q. B. D. 173, 177). Cave, J., when delivering the judgment of the Court in the case of *R. v. Handsley*, 1881, 8 Q. B. D., at p. 387, stated the rule thus: "In order to disqualify the justice, it must be established that he has such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter." And this statement was adopted as "the rule of law" by Stephen and Charles, J.J., in *R. v. Farrant*, 1887, 20 Q. B. D., at p. 61.

The mere fact that the judge is related to one of the parties is not sufficient to disqualify him. In the case cited above from Hardres, the Earl of Derby was judge of the local Court of Chester; the defendant, the Earl of Rivers, had married his sister; yet the Court refused a prohibition. Again, the fact that one of the justices had given evidence for one of the parties, who now appear before him, in a civil proceeding involving a somewhat similar issue, is no disqualification (*R. v. Alcock, Ex parte Chilton*, 1878, 37 L. T. 829). Nor is the fact that he had been heard to express an opinion on the case which was to come before him (*ibid.*). It would be very improper for a magistrate seriously to offer to make a bet as to the result of the hearing before the bench; such an offer, however, may be only his way of expressing an opinion, without any serious intention of betting. If he, in fact, made such a bet, he would be disqualified by pecuniary interest (*R. v. Farrant*, 1887, 20 Q. B. D., at p. 62). An attempt to persuade the parties to settle amicably does not prevent a magistrate from being in a position afterwards to adjudicate fairly on the case (*ibid.*). Nor will he be disqualified merely because he has been served with a subpoena to appear as a witness in the case (*R. v. Tooke*, 1884, 32 W. R. 753; 48 J. P. 661).

In *R. v. Farrant, supra*, the Court declined "to hold as a matter of law that, because a magistrate or a judge is likely to be called as a witness, he is bound not to sit. Such a doctrine might cause great inconvenience; as, for instance, if a judge of assize were subpoenaed just before the trial, the effect might be to necessitate a postponement to the next assizes, and it would be in the power of either party, by serving a subpoena, to prevent any particular judge or magistrate from sitting."

The objection that a judge or justice is interested may be waived either expressly or by conduct. If the parties, with full knowledge of such interest, acquiesce in his sitting and adjudicating on the case, they will be precluded from relying on this objection (*Wakefield Local Board of Health v. West Riding Railway Co.*, 1865, L. R. 1 Q. B. 84; 6 B. & S. 794; *R. v. JJ. of Antrim*, 1895, 2 Ir. R. 603).

Where the tribunal is an administrative, rather than a judicial, body, a less strict rule applies (*In re The Empire Theatre*, 1894, 71 L. T. 638; *R. v. Huggins* [1895], 1 Q. B., at pp. 565-66), possibly because an administrative body has generally a far larger number of members. Thus, the General Council of Medical Education and Registration is not a Court (*Allbutt's case*, 1889, 23 Q. B. D. 400); and the mere fact that a member of that council is also a member of a society called the Medical Defence Union, which instituted the proceedings before the council, is (in the absence of all pecuniary interest) no disqualification (*Leeson's case*, 1889, 43 Ch. D. 366; *Allinson's case* [1894], 1 Q. B. 750). Again, the London county council is not a judicial tribunal (subs. 2 of sec. 78 of the Local Government Act, 1888). Hence the mere fact that a member of that county council attended a meeting of persons who were opposed to a particular application, and advised them as to the form of the procedure they should adopt, will not disqualify him from voting when the matter subsequently comes before the council (*In re The Empire Theatre, supra*). Nevertheless the whole proceedings will be vitiated if members of the council instruct counsel to oppose an application made to themselves and their colleagues (*Ex parte Akkersdyk* [1892], 1 Q. B. 190).

• **Bicycles.**—See CYCLING.

• **Bid (Bidder; Biddings).**—See AUCTION; AUCTIONEER.

**Biens** (French law) are things capable of appropriation. They are divided into moveable, the French equivalent of personal, property, and immoveable, that of real property (see *Code Civil Arts.*, 516 *et seq.*).

**Bigamy.**—1. *Ecclesiastical Law.*—In ecclesiastical law, bigamy originally meant marrying more than one wife or husband, whether the first was alive or dead. (*Bigamus*, *δύγαμος*.) In the Orthodox Church a different form of marriage service is provided for persons who marry a second or third time, and such persons are liable to exclusion for a period from communicating. In England *bigami* (bigamous clerks) were not entitled to benefit of clergy. See BENEFIT OF CLERGY.

• See further as to whether the remarriage of divorcees is bigamous by ecclesiastical law, MARRIAGE.

Bigamy by the husband, coupled with adultery, is in England (but not in Ireland) a matrimonial offence which entitles the other to a decree of divorce *a vinculo* (20 & 21 Vict. c. 85, s. 27). Proof of a conviction for bigamy is not necessary nor in strictness admissible, and is in no sense conclusive, in the matrimonial cause (*Marsh v. March*, 1858, 28 L. J. Mat. 30).

The wife is in these proceedings a competent witness to prove the marriage. The second marriage must be one which but for the subsistence of the prior marriage would have been valid (*R. v. Penson*, 1832, 5 Car. & P. 412). A bigamous marriage was always held void in ecclesiastical law (*Miles v. Chilton*, 1849, 1 Rob. Eccl. 684; *L. v. Brawn*, 1843, 1 Car. & Kir. 144), but it was and is not uncommon to seek a formal declaration of its nullity (*Burt v. Burt*, 1860, 29 L. J. M. C. 133), and in such proceeding the respondent, even though convicted of bigamy, can traverse the validity of his first marriage (*Burke v. Burke*, 1825, 2 Add. 471).

The Ecclesiastical Courts were by sec. 2 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), deprived of all jurisdiction over marriage as creating civil rights and duties. But in theory they retain a certain amount of jurisdiction *pro salute animæ*, as in the case of incestuous marriages (see *Harris v. Hicks*, 1692, 2 Salk. 548; *Ray v. Sherwood*, 1836; *Rendall v. Voules*, 1856; Phill. Eccl. Law, 2nd ed., 1070; 1 Curt. 199, 1 Moo. P. C. 353).

2. *Criminal Law*.—Bigamy was made felony with benefit of clergy (*q.v.*) in 1603 by 1 Jas. I. c. 11, repealed and re-enacted by 9 Geo. IV. c. 31, s. 22, which in its turn was repealed by 24 & 25 Vict. c. 95, and reproduced almost *verbatim* as sec. 57 of the Offences against the Person Act, 1861, 24 & 25 Vict. c. 100. In its present position in the statute-book the offence is treated as a wrong against the chastity of the second wife; but the first wife is equally entitled to prosecute.

The term "marriage" for the purposes of bigamy means monogamous marriage as understood in Christendom, a contract which means the voluntary union of one man to one woman for life, to the exclusion of all others. And, an Englishman who abroad goes through a ceremony of marriage which does not bind him to monogamy cannot be guilty of bigamy if he takes a second wife while the first is alive (see *In re Bethell*, 1888, 38 Ch. D. 220 (a marriage according to African customs), and *Hyde v. Hyde*, 1866, L. R. 1 P. & D. 130 (the case of a Mormon marriage). In s. 57 it is used in two distinct senses. Being married means being *validly* married; whereas "shall marry" means shall go through a ceremony of marriage which *ex hypothesi*, must be invalid (*R. v. Allen*, 1866, L. R. 1 C. C. R. 367).

As defined by statute for the purpose of criminal justice the offence is committed (1) when a married person, wherever married before, goes through in England (or Ireland) the ceremony of marriage again with a person other than the first husband or wife during the continuance of the former bond of wedlock; (2) when a married British subject outside England or Ireland goes through the ceremony of marriage with a person other than the first husband or wife during the continuance of the former bond of wedlock.

The Act of James applied only where the second marriage was in England (1 Hale, P. C. 692). Under (1) a foreigner may be convicted if the second marriage was in England, if they were by race, religion, or nationality subject to the universal law of Christendom as to monogamy (see Mayne, *Ind. Cr. Law*, 1896, 794, 795). But foreigners whose second marriage was abroad, and persons domiciled in Scotland, who after a

first marriage in Scotland bigamously remarry in Scotland, seem not to be within the Act, though if resident in England at the time of the marriage they would be liable (see *R. v. Topping*, 1856, 25 L. J. M. C. 72).

But under (2) power seems to be given to the English Courts to try any British subject of European stock or Christian faith who anywhere in the world commits bigamy irrespective of the place where his first marriage took place. The constitutional limitations on colonial legislation (see COLONY) (*McLeod v. A.-G. of N.S.W.* [1891], App. Cas. 455) prevent any colonial tribunal from having jurisdiction over bigamy under colonial Acts, except in cases where the second marriage is celebrated within the colony, and consequently the only mode of reaching many cases of bigamy is through the procedure of 24 & 25 Vict. c. 100, s. 57, which permits of the trial or punishment of the offender in any county of England or Ireland in which he is arrested or is in custody.

In indictments it is not uncommon to include an averment that the accused is in custody within the jurisdiction of the Court of trial. But the averment is quite unnecessary under the present Act, though it is usually inserted (Archb. *Cr. Pl.*, 21st ed., 1016; 1 Russ. on *Crimes*, 6th ed., 665 n.). Under 9 Geo. iv. c. 31, s. 22, the averment seems to have been thought necessary when the second marriage was outside the county of trial (*R. v. Fraser*, 1834, 1 Moo. C. C. 407; *R. v. Whiley*, 1843, 1 Car. & Kir. 150). A person who aids, abets, counsels, procures, or commands another to commit bigamy is rendered subject to the same punishment as the principal offender, by secs. 1, 2 of the Accessories and Abettors Act, 1861, 24 & 25 Vict. c. 94, and sec. 67 of the Offences against the Person Act, 1861, 24 & 25 Vict. c. 100. And if the second husband or wife marry, knowing the first wife or husband to be alive, he or she is liable as an accessory before the fact or for inciting to commit bigamy (*R. v. Brawn*, 1843, 1 Car. & Kir. 144; 24 & 25 Vict. c. 100, s. 68). Bigamy within the admiralty jurisdiction on a Queen's ship or other British vessel is within sec. 57.

The first marriage must be valid in form by the law under which it was contracted, which is usually the *lex loci contractus* (24 & 25 Vict. c. 100, s. 68); but in cases within the Foreign Marriages Act, 1892, 55 & 56 Vict. c. 23, and the Acts which it superseded, is the law of the country before whose officer it was celebrated. Marriage in England according to the rites of a foreign religious community is not valid in England unless the formalities imposed by English law are also satisfied (see the Greek Marriage Act, 1884, 47 & 48 Vict. c. 20), even when the parties are not domiciled in England. The marriage rites of Jews are protected by 4 Geo. iv. c. 76, s. 31; 6 & 7 Will. iv. c. 85, ss. 2, 4; 3 & 4 Vict. c. 72, s. 5; 19 & 20 Vict. c. 119, s. 20; see Geary on *Marriage*, 100-102. And marriages celebrated in embassy houses and chapels appear to be recognised as valid (see *Ruding v. Smith*, 1821, 1 St. Tri. N. S. 1066; *Pertreis v. Tondear*, 1 Hag. Con. 136).

It must also, as a rule, be valid in substance, *i.e.* not void, and be such a marriage as would entitle the issue to succeed *ab intestato* to personal (if not to real) estate in England. Thus a foreigner who, having married his deceased wife's sister in a country where it was lawful, could be convicted of bigamy if he remarried in England during her life; although an Englishman who had done the same thing, either in England (or perhaps in a country in which he was not domiciled) (*Brook v. Brook*, 1856, 3 Sm. & G. 481), apparently could not be indicted, the first marriage being absolutely void under 5 & 6 Will. iv. c. 64, s. 2 (*R. v. Chadwick*, 1847, 11 Q. B. 173). This decision must be read subject to the express words of sec. 57, that it is not to

extend to a person whose former marriage has been declared void by the sentence of any Court of competent jurisdiction, which would naturally be read as requiring the parties to get a judicial declaration of the invalidity of the first marriage before contracting a second. But the course of decided cases on 9 Geo. IV. c. 31, and the Act of 1861, has proceeded on the assumption that affirmative proof of validity of the marriage is to be given by the prosecution, and not merely its celebration, although this assumption requires the word married to be understood in two different senses in the section. Thus a marriage voidable for impotence would support a prosecution for bigamy, and a plea of impotence would be no defence (see *Balies A. v. B.*, 1891, 27 L. R. Ir. at 608). Where the marriage is voidable only, it is good enough to support an indictment for bigamy (*R. v. Jacobs*, 1826, 1 Moo. C. C. 140).

Under the Act of James a divorce *a mensâ et toro* is said to have been a good defence (Hawk., P. C., bk. 1, c. 42, s. 5), but under the present law divorce *a vinculo* must be proved. The wording of the Act does not clearly show whether the words "by the sentence of a Court of competent jurisdiction" apply to divorce as well as to the words "declared void"; but as the proviso in which they occur is transcribed *verbatim* from 9 Geo. IV. c. 31, passed when no Court in England could divorce *a vinculo*, this construction should be rejected. The divorce, however, must be granted by Parliament or a Court of competent jurisdiction, *i.e.* a Court of the county in which the husband is actually and in good faith domiciled for all purposes at the date of the proceedings which culminate in the decree (*Le Mesurier v. Le Mesurier* [1895], App. Cas. 52; *Green v. Green* [1893], Prob. 89). Where the competent Court is not an English Court the grounds of divorce need not be those recognised by English law (*Harvie v. Farnie*, 1882, 8 App. Cas. 43). In countries where the jurisdiction over marriages is left to ecclesiastical law, it would seem that a divorce by the ecclesiastical authorities or by papal rescript, provided that such mode of divorce were recognised in the country of domicile, would be a good divorce within sec. 57 (see *Parapano v. Happaz* [1894], App. Cas. 65). Divorces by a Rabbi in England, according to Jewish law in England, would seem insufficient, as Jews can resort to the matrimonial Court (see *D'Aquitor v. D'Aquitor*, 1794, 1 Hag. Ec. 773). Under the Indian Penal Code, by which the divorce customs of Hindus and Mohammedans are recognised, curious difficulties arose in fixing at any given time the matrimonial law to be applied to Eurasians or full-blooded native Christians (see Mayne, *Ind. Cr. Law*, 1896, 791-796); and in the case of the marriage of British subjects in Turkey or other Eastern States, it is necessary to consider under which of the different systems of marriage law or usages there prevailing under Turkish or foreign jurisdiction the marriage was intended to be contracted (see *Parapano v. Happaz* [1894], App. Cas. 65). The second marriage to be bigamous must *ex vi termini* be invalid, *i.e.* the going through the ceremony cannot have the effect of creating any *vinculum matrimonii*; and the offence consists in going through the form under such circumstances.

It is not necessary that the form should, apart from the personal disability of the bigamist, have in law the effect of creating a valid marriage; but it must be such a form as if gone through without fraud and in proper compliance with the formalities would have been treated as binding.

Thus a marriage by banns under a false name was held sufficient to support an indictment for bigamy under 7 & 8 Geo. IV. c. 31 (*R. v. Penon*, 1832, 5 Car. & P. 412), as will a marriage before a registrar where a false Christian name is given (*R. v. Rea*, 1872, L. R. 1 C. C. R. 365). Even if the second marriage is invalid for consanguinity or affinity or irregularity, it is bigam-

ous within the Act of 1861 (*R. v. Allen*, 1872, L. R. 1 C. C. R. 367; *R. v. Lumley*, 1866, L. R. C. C. R. 96; *R. v. Brawn*, 1843, 1 Car. & Kir. 144).

A further statutory defence is given by sec. 57 to "a person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past (at the date of the second marriage), and shall not have been known by such person to be living in that time," i.e. at any period during the seven years (*R. v. Jones*, 1840, 9 Car. & P. 681). If absence for seven years is proved, the prosecution have to prove the defendant's knowledge that the absent spouse was alive at the date of the marriage (*R. v. Willshire*, 1881, 6 Q. B. D. 366).

Honest belief (based on reasonable grounds) in the death of the other spouse within the seven years is a good defence. This was decided in *R. v. Tolson*, 1889, 23 Q. B. D. 168, which put an end to a long controversy and much division of judicial opinion on this point.

To sustain an indictment for bigamy, the following matters must be proved:—1. The fact of the first marriage and its validity, or that if voidable it has not been annulled.

(a) In the case of an English marriage it is enough to call a person who was actually present at the ceremony, and can speak of the nature of the ceremony, so that the Court can judge whether it was such as by law would suffice to constitute a marriage (*Millis v. R.*, 1844, 10 Cl. & Fin. 534), and can identify the parties (*R. v. Manwaring*, 1856, 26 L. J. M. C. 10; *R. v. Simpson*, 1883, 15 Cox C. C. 323); and it is not necessary to prove the issue of a licence, the publication of banns, or the registration of the marriage. Evidence of acknowledgment, cohabitation, or reputation do not seem to be sufficient (*R. v. Willshire*, 1881, 6 Q. B. D. 366; *Morris v. Miller*, 1768, 4 Burr. 2057). Where the marriage is between Jews by Jewish rites, a written contract of marriage must be produced (*R. v. Althausen*, 1893, 17 Cox C. C. 630).

(b) In the case of a marriage outside England, it may be proved by any person present. But it is also necessary to prove the circumstances under which it was celebrated and that evidence should be given of the *lex loci contractus* as to the validity of the ceremony, by a person who is expert in the law (*R. v. Povey*, 1852, 22 L. J. M. C. 19; *R. v. Savage*, 1876, 13 Cox, 178; *R. v. Griffin*, 1879, 14 Cox, 308). See ABROAD, MARRIAGES.

2. The subsequent marriage must be proved in the same way as the first. The fact that the Christian names or surnames of either party to the second marriage are wrongly entered in the register is immaterial, even though the error is due to misstatements by either party, provided that proof is given of the celebration of a marriage to which the accused is identified as having been a party (*R. v. Rea*, 1872, L. R. 1 C. C. R. 365; *R. v. Allen*, 1872, L. R. 1 C. C. R. 367).

3. That the first wife was seen alive when the second ceremony was performed, either by her production and identification in Court or by any other means which will give the jury reasonable grounds for inferring that she was then alive (*R. v. Lumley*, 1869, L. R. 1 C. C. R. 196). Where absence of the other spouse for seven years is proved, the prosecution must prove that the defendant knew that the other spouse was alive (*R. v. Curgerwen*, 1866, L. R. 1 C. C. R. 1).

4. It is said that where the second marriage was not in the county where the defendant is indicted, proof must be given that he is in custody in the county of trial. As to this Archbold (21st ed., p. 1022) does not agree with himself (p. 1019); and assuming the necessity of proving it to

the grand jury, when the defendant is in the dock and in charge of the jury, it is somewhat absurd to talk about proving that he is in custody.

The first wife is not a competent witness for either side on a prosecution for bigamy (Hawk., P. C., bk. 1, c. 42, s. 8), although to take objection to her competency is an admission of the existence and validity of the marriage. (But see *R. v. Apley*, 1881, 15 Cox C. C. 328.) The second wife becomes a competent witness after proof of the first marriage and that the first wife was living at the date of the second marriage (1 Hale, P. C. 393).

[For other authorities see Phillimore, *Eccl. Law*, 2nd ed., 548-644; Stephen, *Dig. Crim. Law*, 5th ed., 211-213; Hawk., P. C., bk. 1, c. 42; 1 Russ. on *Crimes*, 6th ed., pp. 659-716; Archb. *Cr. Pl.*, 21st ed., 1016-1023; Mayne, *Crim. Law of India*, 1896, 790-800; Geary on *Marriage*; Eversley, *Domestic Relations*, 2nd ed., 80-84; Dicey on *Conflict of Laws*, 755-759.]

**Bilinguis** denotes properly one who has the command of two languages, but is applied in a legal sense to the jury composed partly of denizens and partly of aliens, which was formerly competent in cases between Englishmen and foreigners (see 27 Edw. III. Stat. 2, c. 8; 28 Edw. III. c. 13; and 8 Hen. VI. c. 29). Such a jury was vulgarly styled a *party jury*, but in more precise language it is also called a jury *e medietate lingue*. The 28 Edw. III. c. 13, granted this kind of jury in cases where the king was party with an alien, and by 6 Geo. IV. c. 50, s. 47, the Court was empowered on the prayer of an alien indicted for felony or misdemeanour to instruct the sheriff or other official to provide a jury to consist as to one half of aliens, if so many were to be found at the place of trial, or else as many as were available. All these statutes have since been repealed, and now by the Naturalisation Act, 1870, 33 & 34 Vict. c. 14, s. 5, an alien is no longer entitled to be tried by a jury bilinguis, but as a natural born subject.

**Bill (Parliamentary).**—See ACT OF PARLIAMENT and PRIVATE BILL LEGISLATION.

**Bill in Chancery** (or BILL IN EQUITY).—The statement of the case of a plaintiff in the Court of Chancery under the old procedure. See now STATEMENT OF CLAIM.

**Bill in Criminal Cases.**—See INDICTMENT.

**Bill of Attainder.**—See ATTAINDER.

**Bill of Costs.**—A bill of costs is a detailed statement of the professional work done by a solicitor for his client, and of the sums which he charges for such work. In the absence of any special agreement (as to which, see SOLICITOR'S REMUNERATION), every solicitor is bound to deliver such a bill to his client on request. Should he unduly delay to deliver such

a bill, the client can obtain an order to compel its delivery. But, as a rule, a solicitor delivers his bill voluntarily, because its delivery is by statute a condition precedent to his bringing an action to recover the remuneration due to him. This article is therefore divided into four heads:—

- I. Form and Contents of a Bill of Costs.
- II. Delivery of a Bill compelled by the Client.
- III. Bill delivered by the Solicitor with a view to an Action.
- IV. Action on a Bill of Costs.

#### *I. Form and Contents of a Bill of Costs.*

The bill should always be headed with the name of the solicitor's own client, although it may be that the bill will eventually be paid by some one else, *e.g.* by the tenant or mortgagor of the client. If the professional services have been rendered in some litigation, the name of the Court and the title of the action or matter should next be stated; and the name of the sittings should appear as a heading to the items of work transacted in each successive sittings. The bill should specify each item for which a charge is made; every payment should be shown; each fee paid to counsel should be stated separately; the date of each attendance should be given, and what was done on each occasion briefly stated. All these items must be arranged in strict order of date under their appropriate headings. The bill should be copied bookwise, and a broad margin left on the left-hand side for use in taxation. The dates should not be put in the left-hand column, where they may confuse the taxation, and be added up among the deductions. They should be placed immediately within the margin, written large and legibly, and scored under.

Where deeds and other instruments are charged for, the number of folios should be stated. The time occupied on attendances and journeys should also be stated, whenever the fee for the same is regulated by time. In charging for journeys, the distances should be given, the actual expenditure should be accurately stated, and the time occupied by the solicitor upon the business of any other client should be deducted. In non-contentious business, where the scale charges under the Solicitors' Remuneration Act and Order apply, the bill will, of course, merely state the scale items applicable to the case.

If the solicitor seeks to recover against his client extra costs not allowed him in a taxation as against the adverse party in a litigation, he should deliver an entire bill of his own costs, giving credit for the taxed costs received, and not merely a bill containing the items of extra costs (*Pigot v. Cadman*, 1857, 1 H. & N. 837).

Professional charges must be entered in a separate column from the disbursements, and every column must be cast before the bill is left for taxation (Order 65, r. 19 H.). Every bill left for taxation must be indorsed with the name and address of the solicitor by whom it is left, and also the name and address of the solicitor, if any, for whom he is agent, including any solicitor who is entitled or intended to participate in the costs to be so taxed (Order 65, r. 27 (58)).

Only those payments which are made in pursuance of the professional duty undertaken by the solicitor, and which he is bound to perform, or which are sanctioned as professional payments by the general practice of the profession, ought to be entered and allowed as professional disbursements in a bill of costs. All other disbursements should be included in a separate cash account. The distinction is important on account of the statutory rule as to the costs of taxation. See **TAXATION**.



## II. *When and how the Client can compel delivery of a Bill of Costs.*

It is the duty of the solicitor to render to his client a bill of costs such as we have just described within a reasonable time after the client has applied to him for such a detailed statement. Should the solicitor unduly delay to deliver such a bill after request, the client can obtain an order from the Court directing its immediate delivery. The Court has power to make such an order independently of any statute by reason of its general jurisdiction over its officers (*Clarkson v. Parker*, 1838, 4 Mee. & W. 532; 7 Dowl. 87). And now by the latter portion of sec. 37 of the Solicitors Act, 1843, any Court or judge who is authorised to refer to taxation a bill of costs which has been delivered, may in the same cases make an order for the delivery by any solicitor, or the executor, administrator, or assignee of any solicitor, of such a bill, and for the delivery up of all deeds, documents, and papers in his possession. The client has a right "to insist on his attorney's letting him know what is due to him" (per Parke, B., 4 Mee. & W. at p. 534). No time is limited for making the application, except where the applicant is not the party chargeable, in which case he must apply within the time limited for taxation. If the solicitor claimed a lump sum for his services from the client, and the client has paid that sum, he can still claim delivery of a bill from the solicitor, unless indeed he has allowed so long a time to elapse since payment, that it would be inequitable now for the Court to order a bill to be delivered. But an order may be made for delivery of a bill in a case in which the Court cannot subsequently order that bill to be taxed (*Duffett v. McEvoy*, 1885, 10 App. Cas. 300, 303). "The two jurisdictions are quite distinct" (*In re West* [1892], 2 Q. B. 102, 108), and the client is entitled to know precisely for what services he has paid (*In re Foljambe*, 1846, 9 Beav. 402; *In re Blackmore*, 1851, 13 Beav. 154; *In re Bailey*, 1865, 34 Beav. 392). If the solicitor has paid himself by retaining moneys of his client or deducting his demand from moneys paid to the client, this will not exempt him from delivering a bill (*In re West*, *supra*; *In re Baylis* [1896], 2 Ch. 107). A country solicitor can compel his London agent to deliver a bill (see *Ward v. Lawson*, 1872, L. R. 8 Ch. App. 65). But if an agreement as to costs has been made between the solicitor and client which is valid under 33 & 34 Vict. c. 28, the client has no right to demand delivery of a bill.

If the business was done in any Division of the High Court, the application for delivery of a bill of costs should properly be made in that Division—though not necessarily to the judge who tried the case, unless the merits of the litigation in some way affect the question. But every judge of the High Court now has power to make such an order, if he thinks fit, although the action was not brought in the Division to which he is attached (*In re Worth*, 1881, 18 Ch. D. 521; *In re Pollard*, 1888, 20 Q. B. D. 656). So where the work was done at Quarter Sessions or before a police magistrate, the application should properly be made to a judge of the Queen's Bench Division, in order that the costs may subsequently be taxed in the Crown Office (*In re Lewis*, 1876, 1 Q. B. D. 724, 726; *In re Jones* [1896], 1 Ch. at p. 226); though in such a case the order may also now be made in the Chancery Division (*In re Jones* [1895], 2 Ch. 719). So the costs of proceedings in bankruptcy should properly be taxed in the Bankruptcy Court. (*In re Marsh*, 1885, 15 Q. B. D. 340; *In re Allingham*, 1886, 32 Ch. D. 36). Where no part of the work was done in any Court, the application for delivery of a bill should properly be made to the Chancery Division, though

every judge of the High Court has jurisdiction to make the order (*In re Pollard*, *supra*).

In the Chancery Division the order was till 1867 obtained, as of course, at the Rolls; it is now made *ex parte*, on a petition of course, by the registrar under Order 62, r. 18 (*In re Porrett* [1891], 2 Ch. 433, 443). In the Queen's Bench Division the application is made by a summons at chambers before the Master, intituled "In the matter of C. D.," naming the solicitor. No affidavit is necessary in either Division, unless there be "special circumstances." Any "party chargeable" may make the application; *e.g.* the executor or administrator or the trustee in bankruptcy of the original client (*Jefferson v. Warrington*, 1840, 7 Mee. & W. 137; *Clarkson v. Parker*, 1838, 7 Dowl. 87; 4 Mee. & W. 532); or the next friend of an infant (*In re Fluker*, 1855, 20 Beav. 143). Even a party in contempt may demand a bill (*Newton v. Ricketts*, 1848, 11 Beav. 67). If several persons are separately liable for the costs (*e.g.* on separate retainers), any one of them may apply for a bill (*Ex parte Ford*, 1854, 23 L. J. Ch. 515). But if several be jointly liable, all should concur in the application (*In re Lewin*, 1853, 16 Beav. 608; *In re Ilderton*, 1863, 33 Beav. 201), though even in this case, if some of those liable refuse to concur or cannot be found, the others may obtain an order on a special application (*Lockhart v. Hardy*, 1841, 4 Beav. 224; *In re Hair*, 1847, 10 Beav. 187; *In re Salaman* [1894], 2 Ch. 201). But whenever a client obtains the common order, he submits to pay what will be found to be due on taxation, and thereby admits the retainer of the solicitor for at least some part of the work (*In re Jones*, 1887, 36 Ch. D. 105). Hence if he desires to dispute the retainer as to the whole bill, he must either not apply at all, or obtain a special order giving him leave to do so (*In re Pyne*, 1848, 5 C. B. 407; *In re Frape* [1894], 2 Ch. 290).

In the Queen's Bench Division the general practice is in the first place to make an order merely that the solicitor do within so many days deliver to the client or his solicitor a bill of costs in all causes and matters wherein he has been concerned for that client, and that he give credit therein for all moneys received by him from or on account of that client (R. S. C. App. K., Form 40 *b*); and no order to tax is usually made till after the bill has been delivered. But in the Chancery Division it is usual for the order for delivery to go on to direct the reference of the bill for taxation (Seton, 4th ed., 614), though the client may of course waive the latter portion of the order, if he is not dissatisfied with the bill, when delivered. The order usually contains a direction that the solicitor shall on payment of the amount found due to him on taxation deliver up all the client's papers (R. S. C. App. K., Form 41). But it is discretionary with the Court to add or not to add this direction (*Ex parte Jarman*, 1877, 4 Ch. D. 835; overruling *In re Teague*, 1848, 11 Beav. 318). The solicitor cannot be ordered to deliver up all papers in his hands when he has a lien on some of them for other costs not included in the order to tax (*In re Byrch*, 1844, 8 Beav. 124; *In re Pender*, 1845, 8 Beav. 299; *Ex parte Jarman*, *supra*; *In re Ward* [1896], 2 Ch. 31).

Should the solicitor refuse or neglect to deliver a bill within the time named, the order should be served on him personally with the proper indorsement; and if he still omits to comply with it, a motion may be made to attach him for contempt (*Dent v. Basham*, 1854, 9 Ex. Rep. 469; *In re Gregg*, 1869, L. R. 9 Eq. 137).

Once a bill is delivered, the solicitor is bound by it; he cannot withdraw

it or amend it, even though it be unsigned (*In re H. C. Jones*, 1886, 54 L. T. 648). He may by special leave add an item omitted by mistake, or correct any slip in the figures; but he may not withdraw an item charged for, nor add charges for other business, nor, except by consent or special order, reduce his charges for the work already specified (*Loveridge v. Botham*, 1797, 1 Bos. & Pul. 49; *In re Heather*, 1870, L. R. 5 Ch. 694; *In re Holroyde*, 1881, 43 L. T. 722; *In re Thompson*, 1885, 30 Ch. D. 441; *In re Wood*, W. N., 1891, 203; *In re Negus* [1895], 1 Ch. 73).

### III. *Bill of Costs delivered by a Solicitor with a View to an Action against his Client.*

As early as 1605 every attorney was required to "give a true bill" unto his "client or master," "subscribed with his own hand and name," and to produce "a ticket" for all fees paid to any serjeant or counsellor, or to any clerk or officer of the Court, before he could charge for his services or be recouped for such disbursements (3 Jac. I. c. 7, s. 1). In 1729 it was further required by the 2 Geo. II. c. 23, s. 23, that an attorney must wait a month after he has delivered a signed bill before he could sue his client to recover the amount. And in 1843, by the 6 & 7 Vict. c. 73, s. 37, it was again enacted that no "solicitor, nor any executor, administrator, or assignee of any solicitor, shall commence or maintain any action for the recovery of any fees, charges, or disbursements for any business done by such solicitor," until the expiration of a clear calendar month (s. 48) after he shall have delivered or sent to the party to be charged therewith "a bill of such fees, charges, or disbursements."

The Act only makes delivery of a bill a condition precedent to an action. Hence a solicitor who has not delivered a signed bill may set off his charges (*Brown v. Tibbits*, 1862, 31 L. J. C. P. 206), or, it is submitted, counterclaim for them; or file a petition, or prove in bankruptcy (*Ex parte Steele*, 1809, 16 Ves. at p. 166; *Ex parte Ditton*, 1880, 13 Ch. D. at p. 320), or sue on a promissory note received on account of his charges (*Jeffreys v. Evans*, 1845, 14 Mee. & W. 210), or foreclose a mortgage given to secure his costs (*Thomas v. Cross*, 1864, 13 W. R. 166), or sue a third person, not his client, who has expressly agreed to pay his charges; for the defence of no signed bill can only be raised by the client himself (*Greening v. Reeder*, 1892, 40 W. R. 623; 67 L. T. 28). But he cannot recover on an account stated in respect of his costs, unless the bill has been duly delivered (*Brooks v. Bockett*, 1847, 9 Q. B. 847). The Act also does not apply to every description of "business" which a person who happens to be a solicitor does for another, but only to professional business which he does as a solicitor—which he is employed to do because he is a solicitor (*Smith v. Dimes*, 1849, 4 Ex. Rep. 32, 40). Agency business done by a firm of solicitors in London for a country solicitor is within the Act (*ibid.*). But a solicitor employed, e.g. by a railway company or a public Board, at a fixed salary, can sue for his salary without delivering any bill (*Bush v. Martin*, 1863, 2 H. & C. 311; 33 L. J. Ex. 17; *Galloway v. Corporation of London*, 1867, L. R. 4 Eq. 90).

So if a solicitor has made a special agreement in writing with his client as to the amount of his remuneration, which is valid under the 33 & 34 Vict. c. 28, he need not deliver any signed bill (s. 15). But a solicitor cannot sue on such an agreement; he can only enforce it by a motion made to the Court (s. 8). The 33 & 34 Vict. c. 28, does not apply, however, to any agreement made between a solicitor and his client as to his remuneration for business which is within the scope of the Solicitors'

Remuneration Act, 1881, 44 & 45 Vict. c. 44, s. 9; for such business he can sue. \* See SOLICITORS' REMUNERATION.

The Solicitors Act, 1843, requires the delivery of a bill of "any fees, charges, or disbursements"; and it will obviously save time and trouble, and avoid all questions hereafter, if every bill delivered with a view to an action is made out in the first instance in regular form as though for taxation. Still it is not absolutely necessary, in order to satisfy the Act, that the bill be drawn up in the precise form on which a taxing master would insist when a bill comes before him for taxation. Thus, a mistake in a date or in the title of the action which does not mislead, will not vitiate the bill (*Williams v. Barber*, 1813, 4 Taun. 806; *Anderson v. Boynton*, 1849, 13 Q. B. 308; 19 L. J. Q. B. 42); nor the omission to name the Court in which the business was done (*Keene v. Ward*, 1849, 13 Q. B. 515; 19 L. J. Q. B. 46; *Cozens v. Graham*, 1852, 12 C. B. 398; 21 L. J. C. P. 206; *Cooke v. Gillard*, 1852, 1 El. & Bl. 26; 22 L. J. Q. B. 90; *Haigh v. Ousey*, 1857, 7 El. & Bl. 578; 26 L. J. Q. B. 217). The statute, however, will not be complied with unless the bill contains full particulars of the business done, and of the solicitor's charges, set out in sufficient detail to enable the client, or some other solicitor whom he may consult, to form a fair opinion as to whether he should proceed to tax the bill or not (*Ivimey v. Marks*, 1847, 16 Mee. & W. 843; *In re Pomeroy and Tanner*, No. 2, 1897, 102 Law Times (newspaper), p. 439). Hence the items of the business and the charges for each professional service must be specified (*Wilkinson v. Smart*, 1875, 33 L. T. 573; 24 W. R. 42; *Blake v. Hummel*, 1884, 1 C. & E. 345; 51 L. T. 430). A charge "for attending a great many times" is too vague (*In re Pender*, 1847, 10 Beav. 390); so is a lump sum charged for costs in an action, though taxed in the action at that sum (*Drew v. Clifford*, 1825, 2 Car. & P. 69). Where "extra costs" (or costs as between solicitor and client) are claimed, they must not be stated without the items of the costs, taxed as between party and party to which they are *extra*; although the solicitor has already received these from the other party in the action (*Waller v. Lacy*, 1840, 1 Man. & Gr. 54; 9 L. J. C. P. 216; *Pigot v. Cadman*, 1857, 1 H. & N. 837; 26 L. J. Ex. 134). Further, it must appear from the bill itself, or the letter accompanying it, or its envelope (*Roberts v. Lucas*, 1855, 11 Ex. Rep. 41; 24 L. J. Ex. 227), who it is that the solicitor is seeking to charge with these costs.

The bill must either itself be subscribed by the solicitor with his own hand, or be enclosed in or accompanied by a letter, referring to such bill and signed by the solicitor with his own hand. If the solicitor be paralysed, his clerk may sign for him (*Angell v. Pratt*, 1883, 1 C. & E. 118). In the case of a partnership, any one of the partners who was in the firm at the time when the work was done may sign the bill with either his own name or the name of that firm (not of any new firm) (*Pilgrim v. Hirschfeld*, 1863, 12 W. R. 51; 9 L. T. 288). If the solicitor has died since the work was done, his executor or administrator—if he has become bankrupt, his trustee (*In re Walton*, 1858, 4 Kay & J. 78)—if he has assigned either his whole practice or a particular bill of costs (*Penley v. Anstruther*, 1883, 52 L. J. Ch. 367; *Ingle v. McCutchan*, 1884, 12 Q. B. D. 518), his assignee—must sign and deliver the bill. If an unsigned bill be delivered, it is at the option of the client to accept it as a signed bill or not as he chooses (*In re Pender*, 1846, 2 Ph. Ch. 69; *Angell v. Pratt*, 1883, 1 C. & E. 118).

The bill must either be "delivered unto the party to be charged therewith, or sent by the post to, or left for him, at his counting-house, office of business, dwelling-house, or last known place of abode." It

must reach "the party to be charged" a clear month before any writ is issued. The term "month" means a calendar month (Solicitors Act, 1843, s. 48; *Ryalls v. R.*, 1848, 11 Q. B. 781), and it is to be calculated exclusively of the days on which the bill is delivered and the action brought (*Blunt v. Heslop*, 1838, 8 Ad. & E. 577; *Freeman v. Read*, 1863, 4 B. & S. 174; 32 L. J. M. C. 226). Delivery to the defendant's servant at the defendant's residence is sufficient (*MacGregor v. Keily*, 1849, 3 Ex. Rep. 794; 18 L. J. Ex. 391). Delivery to any agent of the defendant's, authorised by him to receive such a document, is sufficient (*In re Bush*, 1844, 8 Beav. 66; *In re Kellock*, 1887, 35 W. R. 695); but the *onus* lies on the solicitor to prove that the agent had such authority (*In re Layton*, 1890, 38 W. R. 652). As a rule, delivery to the defendant's solicitor is not delivery to the defendant, unless an order has been obtained which prescribes such delivery (*Vincent v. Slaymaker*, 1810, 12 East, 372; 11 R. R. 413; *In re Abbott*, 1861, 4 L. T. 576). But where the party chargeable had no place of business of his own, but occasionally called and wrote letters at the office of his solicitor, and had directed communications to be addressed to him there, delivery of a bill at that office more than a month before the writ was issued was held to be a good delivery under the Act; although, as a matter of fact, the bill only reached the defendant's own hands a fortnight before action (*Spier v. Bernard*, 1863, 8 L. T. 396). Where several are jointly liable for the same costs, delivery of a bill to one is, in general, a delivery to all (*Mant v. Smith*, 1859, 4 H. & N. 324; 28 L. J. Ex. 234), unless the bill is drawn up in such a way that it appears to charge only the person to whom it is delivered (*Kiernan v. Breerton*, 1866, 17 Ir. C. L. R. 203). As to delivery of a bill to a committee, see *Eggington v. Cumberledge*, 1847, 1 Ex. 271; 16 L. J. Ex. 283; *Edwards v. Lawless*, 1848, 6 C. B. 329; 17 L. J. C. P. 293; *Blandy v. De Burgh*, 1848, 6 C. B. 623; 18 L. J. C. P. 2. But delivery to a friend or relation of the client is not a compliance with the Act (*Gridley v. Austen*, 1849, 16 Q. B. 504, 511; 18 L. J. Q. B. 337).

The bill must be left with the client, not merely shown to him (*Phipps v. Daubney*, 1851, 16 Q. B. 514, 525; 20 L. J. Q. B. 273; *Crowder v. Shee*, 1808, Camp. 437). If, however, the bill is once placed in his hands, with power to keep it, this may be a good delivery, even though the client afterwards return the bill (*Phipps v. Daubney*, *supra*). But it is no delivery if the bill is sent *alio intuitu*—e.g. where it was sent to enable the defendant to agree with the plaintiff what sum he should pay for costs as part of the terms on which an action was to be compromised (*In re Hulbert and Crowe*, 1894, 71 L. T. 748).

If the client applies for a reference to taxation *within* the month, it is imperative on the Court to make the order (Solicitors Act, 1843, s. 37; *Ex parte Jarman*, 1877, 4 Ch. D. p. 837, per Jessel, M. R.); whereas, on an application *after* the month, the Court has a discretion, and the order may be accompanied by such special directions as may appear necessary to do justice between the parties (*In re Gaitskell*, 1845, 1 Ph. Ch. 576; 9 Jur. 909; *In re Bromley*, 1844, 7 Beav. 487; *Ex parte Ellis*, 1860, 2 L. T. 233).

The order, whether obtained by the client or the solicitor, always contains a direction that the solicitor shall not commence or prosecute any cause or matter touching his demand pending taxation (R. S. C. App. K., Forms 41 and 42). And it would therefore be a contempt of Court for the solicitor to commence any action for his costs till the reference is ended. And when the taxation is completed, an action is still unnecessary, unless

the retainer be disputed or liability denied *in toto* on some other ground. For if the order contain a direction that the client shall pay the amount found due on taxation—and in the Chancery Division it is still apparently the practice to insert such a clause whenever the client applies for taxation, though it is not contained in the official form (No. 40, R. S. C. App. K.)—this direction can be enforced by summons as soon as the taxing master has given his *allocatur*. Where there is no such direction—and there cannot be, when it was the solicitor who applied for the order to tax—"the proper course is to move for an order upon the party to pay the amount of the *allocatur* or certificate, and then to proceed by attachment, if that order be disobeyed" (per Erle, J., in *In re Woodhouse*, 1845, 2 C. B. at p. 292), or issue execution under Order 42, r. 17. It is true that North, J., has recently held in *In re Debenham and Walker* [1895], 2 Ch. 430, that in such a case the solicitor "must bring an action against the client," but the learned judge seems to have ignored the provisions of sec. 43 of the Solicitors Act, 1843, and the common law decisions under that section. And indeed it was held in Chancery in 1853 that a solicitor who unnecessarily commenced an action against his client, after taxation, was guilty of "a high contempt" of Court (*In re Campbell*, 3 De G., M. & G. 585). The Court can always, under its general jurisdiction over its officers, make a summary order that a solicitor shall pay to his client any balance found due to him on taxation, although there was no express undertaking by the solicitor to pay ([1895], 2 Ch. at p. 432; and see *In re A Solicitor*, *ibid.* 66).

Under special circumstances the Court or a judge may authorise the solicitor to bring an action before the month has expired, *e.g.* "on proof to the satisfaction of the said judge that there is probable cause for believing that the party chargeable therewith is about to quit England, or to become a bankrupt, or a liquidating or compounding debtor, or to take any other steps, or do any other act which, in the opinion of the judge, would tend to defeat or delay such attorney or solicitor in obtaining payment" (Solicitors Act, 1843, s. 37, as amended by 38 & 39 Vict. c. 79, s. 2).

#### IV. *Action on a Bill of Costs.*

• The plaintiff's claim in such an action may be specially indorsed on the writ (*Smith v. Edwardes*, 1888, 22 Q. B. D. 10), and his case at the trial is generally short and simple. He has, as a rule, merely to prove that the defendant retained him to act in certain matters as the defendant's solicitor (see RETAINER), and that, as such solicitor, he did the work mentioned in the bill. If some items prove to have been inserted by mistake, or not to be recoverable against the defendant, the plaintiff is still entitled to a verdict on the other items (*Waller v. Lacy*, 1840, 1 Man. & G. 54; 9 L. J. C. P. 217; *Pilgrim v. Hirschfeld*, 1863, 12 W. R. 51; 9 L. T. 288; *Blake v. Hummel*, 1884, 1 C. & E. 345; 51 L. T. 430).

1. *Charges Reasonable.*—The plaintiff need not—in the first instance, at all events—go through the bill in detail, and prove that each item of work was in fact done. Nor need he give any evidence to show that his charges for such work are reasonable. For all items in a solicitor's bill of costs now are taxable; and it has therefore been held that if the defendant takes no step before the trial to have the plaintiff's bill taxed, he will be deemed to have acquiesced in the charges contained in it, and will not be allowed to dispute their reasonableness before the jury, who cannot judge of such matters so well as a taxing master (*Anderson v. May*, 1800, 2 Bos. & Pul. 237; *Lee v. Wilson*, 1815, 2 Chitty, at p. 65). The present practice, however, is, if the only dispute in the action is as to the propriety or amount of

certain items, to give the plaintiff leave at once to sign judgment under Order 14, for the amount at which the bill shall be taxed (*Smith v. Edwardes*, 1888, 22 Q. B. D. 10). If there be other defences, *e.g.* if the retainer is disputed, then the action proceeds to trial, and if these other defences fail, judgment is given for the plaintiff for the full amount of the bill, subject to taxation; though strictly after verdict there can be no taxation without the consent of the plaintiff (s. 37, and see *In re Barnard*, 1852, 2 De G., M. & G. 359; *Lumley v. Brooks*, 1889, 41 Ch. D. 323; *Gilseman v. McGovern*, 1892, 30 L. R. Ir. 300).

2. *No Signed Bill*.—The defence that no signed bill has been delivered must be specially pleaded (*Lane v. Glenny*, 1837, 7 Ad. & E. 83; Order 19, r. 15). If such a plea has been placed on the record, the plaintiff must prove that a proper bill of costs was duly delivered within the time and in the manner defined above. If the bill was duly delivered to the client in his lifetime, the action may be brought against his executors without any re-delivery of the bill to them (*Reynolds v. Caswell*, 1811, 4 Taun. 193).

3. *Statute of Limitations*.—If the defendant pleads the Statute of Limitations, the plaintiff must prove that he commenced his action within six years of the date when the right of action first accrued to him. The statute does not run from the delivery of the signed bill, but from the date when the business was completed or the client died (*Whitehead v. Lord*, 1852, 7 Ex. Rep. 691; 21 L. J. Ex. 239. But see *In re Hall & Barker*, 1878, 9 Ch. D. 538; and *In re Romer* [1893], 2 Q. B. 286).

4. *Plaintiff not qualified*.—It is a good defence to an action for costs that the plaintiff was not at the time the work was done (*Kent v. Ward*, 1894, 70 L. T. 612) a duly qualified practitioner (6 & 7 Vict. c. 73, s. 2; 37 & 38 Vict. c. 68, s. 12). This defence also must be specially pleaded (*Hill v. Sydney*, 1838, 7 Ad. & E. 956). If such a defence be pleaded, it is for the plaintiff to prove that he was qualified—which is most readily done by his producing his certificate duly stamped. By the 23 & 24 Vict. c. 127, s. 22, the law list also is made admissible as *prima facie* evidence that every one whose name appears therein as a solicitor is qualified to practise.

5. *Special Agreement*.—If a special agreement (valid under the 33 & 34 Vict. c. 28) was made between the plaintiff and the defendant, by which the plaintiff undertook to do the work for a less sum than he is now claiming, the defendant may plead the special agreement as a defence; no action can be brought on such an agreement (sec. 8 of the last cited Act). Or the defendant may plead that the plaintiff undertook the cause *gratis* (*Ashford v. Price*, 1823, 3 Stark. 185). An agreement with the client "to charge him nothing if he lost the action, and to take nothing for costs out of any money that might be awarded to him in such action," need not be reduced into writing (*Jennings v. Johnson*, 1873, L. R. 8 C. P. 425). A solicitor is *prima facie* entitled to be paid for professional services, but he cannot recover any remuneration if the defendant proves that he undertook to do the work gratuitously (*Hingston v. Kelly*, 1849, 18 L. J. Ex. 360; *In re Stretton*, 1845, 14 Mee. & W. 806).

6. *Negligence*.—It will be a defence to the action if the defendant can show that through the default of the plaintiff he has derived no benefit whatever from the plaintiff's services. If through the plaintiff's negligence all steps taken prove useless (*e.g.* where the solicitor, through culpable ignorance, brought the action in a Court which had no jurisdiction in the matter), he can recover no part of his bill. But if the plaintiff's negligence has not been such as to deprive the defendant of all benefit, it is only a defence *pro tanto* to portions of the bill (*Shaw v. Arden*, 1832, 9 Bing. 287).

or it may be ground for a counterclaim, as in *Slater v. Cathcart*, 1891, 8 T. L. R. 92. See SOLICITOR, *Negligence of*.

7. *Interest*.—A solicitor is entitled, after taxation of his bill, to interest at 4 per cent. on the amount of the bill as taxed from one month from the date of its delivery (*In re Strother*, 1857, 3 Kay & J. 518, 528), the mere delivery of the bill being a sufficient “demand” (*Blair v. Cordner*, 1887, 19 Q. B. D. 516). By the Solicitors Act, 1870, the taxing officer is also empowered to allow interest at such rate and from such times as he thinks fit, on disbursements made by a solicitor for his client (33 & 34 Vict. c. 38, s. 17). But this provision only applies to dealings between solicitor and client, and not to a case where costs are to be paid out of a fund in Court belonging in part to others (*Hartland v. Murrell*, 1873, L. R. 16 Eq. 285; *Withington v. Neumann*, 1889, 40 Ch. D. 475), nor to disbursements made by a London agent on behalf of a country solicitor, the latter not being a “client” within the Act (*Ward v. Eyre*, 1880, 15 Ch. D. 130). [See Johnson’s *Bills of Costs*, 1897.]

**Bill of Credit.**—A letter whereby one person requests another to advance moneys to a third person named therein for a certain amount, and promises to reimburse the person making the advance. It is more usually termed a LETTER OF CREDIT (*q.v.*); and see CIRCULAR NOTE.

**Bill of Entry.**—A certificate delivered to the Customs authorities by importers of goods, giving particulars of such goods, and the port or place from which they have been imported. The term is likewise applied to a somewhat similar certificate given on the exportation of goods. See the Forms in Schedule B to the Customs Consolidation Act, 1876.

**Bill of Exceptions.**—See ERROR.

**Bill of Indemnity.**—A bill introduced into Parliament to legalise transactions which, when they took place, were illegal, or to exempt particular persons from punishment for breaches of the law. Before the abolition of tests for municipal offices, an Indemnity Act was regularly passed to relieve dissenters from penalties for having accepted office. Such Acts have also invariably been passed after a suspension of the *Habeas Corpus* Act; and not unfrequently to relieve peers from penalties for having voted in Parliament before taking the oath.

**Bill of Pains and Penalties.**—A bill introduced into Parliament, usually in the House of Lords, with the object of inflicting punishment on a person without a trial in the usual way in a Court of law. In this respect a bill of pains and penalties resembles a bill of attainder (see ATTAINDER); but while the latter imposes the punishment of death, the former inflicts some lesser penalty. The procedure in passing such bills is the same as that followed in ordinary legislation, but the parties affected by the proceedings are permitted to defend themselves by counsel and witnesses in both Houses (May’s *Parl. Practice*, 10th ed., p. 632).

In general, bills of pains and penalties have been introduced and passed



into statutes for the punishment of persons guilty of treason or other high crimes and misdemeanours, see for example the Act inflicting pains and penalties on Atterbury, Bishop of Rochester, given in Howell's *State Trials*, vol. xvi. p. 644. By that Act, Atterbury, on the ground of his treasonable correspondence with the Pretender, was deprived of all his offices, rendered incapable of holding any office in future within His Majesty's dominions, and condemned to perpetual banishment. At one time such bills were occasionally had recourse to in less grave offences; see a number of instances in Hatsell's *Precedents of Parliament*, vol. iv. pp. 307 *et seq.* The last instance of a bill of pains and penalties being before Parliament was in the case of Queen Caroline in 1820.

**Bill of Parcels.**—An account of the items and price of the goods consigned by a seller to his buyer.

**Bill of Rights.**—The Declaration of Rights was made by the Lords spiritual and temporal and Commons convened at Westminster, and was accepted by William and Mary on the 13th of February 1688–89. They thereupon became king and queen. The Acts of this Convention on and after that date were confirmed by 1 Will. & Mary, c. 1. The Declaration was embodied in a bill later in the same year, but failed to pass, owing to a difference between the Lords and Commons. The Lords wished to limit the settlement of the Crown in case of failure of heirs to William, Mary, and Anne; the Commons thought that there was no such necessity. Later in the year a son was born to Anne, and the Houses agreed to look no further for heirs to the Crown; so on the 16th of December 1689 the Bill of Rights became law.

It is an embodiment of the Declaration, with two provisions which were not in the Declaration, one intended to ensure that no king or queen should be or should marry a papist, the other intended to stop the exercise of the prerogative in dispensing with the operation of statutes.

The Act consists of three clauses. The first contains: (1) A recital of the misdeeds of James; (2) a recital of his abdication, of the vacancy of the throne, and of the summons of the Convention by William of Orange; (3) a declaration of constitutional rights and liberties; (4) a tender of the Crown to William and Mary upon certain conditions as to the exercise of regal power, the limitation or settlement of the Crown, and the oaths of allegiance and supremacy; (5) an acceptance of the Crown by William and Mary, an expression of their wish that the two Houses should continue to sit, and of their readiness to affirm the rights and liberties of the people; (6) a declaration that William and Mary were king and queen, upon the conditions aforesaid; (7) securities against a king or queen being, or marrying, a papist.

The second clause deals with the dispensing power.

The novelties in the Bill of Rights are few. Unlike the Act of Settlement (*q.v.*), it does not ostensibly enact new law. But it states facts, and incidentally lays down principles which give a new character to the Constitution. These are to be found in the statements that James had *abdicated*, and that the throne was *vacant*, and in the subsequent conditions upon which the Crown was offered to William and Mary and accepted by them.

The statement that James had abdicated the throne, following, as it did,

upon a recital of his misdeeds, is equivalent to a statement of his deposition. The Constitution had no machinery for cases in which the king was morally or physically unfit to govern, and the abstract character of the discussions on the use of the word "abdicate" show that its opponents considered that the whole theory of Divine Right was at stake. When the Convention agreed that James, having misgoverned, had abdicated, this view of kingship received its deathblow. See ABDICATION.

In declaring that the throne was vacant, another theory was overthrown, an outcome of the feudal land law,—the theory that the Crown was a hereditament which, like the seisin of an estate in fee, could never be in abeyance. Thus the reign of Charles II. does not date from his accession, but from the moment of his father's death. The two theories together came to this: there must always be some one entitled to the Crown, and that title carries with it a divine sanction. The Convention Parliament upheld, and the Bill of Rights confirmed, the view that a king who misgoverns may be deposed, and that the nation is then free to seek for the most suitable person to take his place. When to this statement of constitutional theory we add the conditions which William and Mary undertook to observe when they accepted the Crown, we find the principle established that monarchy in this country exists for the benefit of the people, and exists not because of a divine right inherent in A. or X., but as a form of government which the people find to be for the common good.

Other noticeable features in the Bill of Rights are—

(1) The account of the mode of summons of the Convention Parliament. The Prince of Orange, "by the advice of the Lords spiritual and temporal, and divers principal persons of the Commons," caused letters to be written to "the Lords spiritual and temporal being Protestants, and other letters to the several counties, cities, universities, boroughs, and cinque ports, for the choosing of such persons to represent them as were of right to be sent to Parliament." The Convention was a Parliament in everything but the formalities of the writ and the absence of a king to declare the causes of summons.

• (2) The tender of the Crown to William and Mary was accompanied by a restriction as to the exercise of the royal power, as well as a settlement of the Crown. William had declared that he would not be a king-consort, and so it was enacted that "the sole and full exercise of the royal power be only in and executed by the said Prince of Orange in the names of the said prince and princess during their joint lives."

(3) The forms of the oaths of allegiance and supremacy (*q.v.*) were altered and shortened. Another Act of 1689 amended the coronation oath, and removed from it some ambiguities of expression. This re-statement of the mutual obligations of sovereign and subject is illustrative of the new and practical aspect from which the monarchy was regarded.

(4) The utmost care was taken to put the provisions of the Declaration out of reach of all question as to their validity. As soon as the Convention became a Parliament by the accession of William and Mary, its Acts were confirmed by the newly-constituted body; the Declaration was re-enacted in the Bill of Rights, and finally all the Acts of the Convention Parliament were confirmed by its successor.

The Bill of Rights is mainly important as a re-statement of the relations of king and subject in such a form as to set aside the monarchical theories of the past two hundred years, and to form the starting-point of the modern constitution; but in three matters it introduced new law.

It was enacted that the maintenance of a standing army within the kingdom in time of peace without consent of Parliament was against law. This was a definite prohibition. The previous check on royal action had, apart from money, been limited to the difficulty of using military law to enforce discipline. A king might have kept a standing army if he could pay for it, and if he could maintain discipline by such sanctions as the common law supplied. Now the military forces of the Crown were brought under the control of Parliament.

It was stated in the Declaration that "the pretended power of suspending and dispensing with laws or the execution of laws, *as it hath been assumed and exercised of late*, is illegal." This left an opening for distinctions between the dispensations of James and those which his successors might choose to make. The Bill of Rights, s. 2, forbade altogether any dispensation "by *non obstante* of or to any statute, except a dispensation be allowed of in such statute," and except in cases to be provided for by subsequent legislation. This legislation did not take place. Sec. 3 contained a saving of charters, grants, or pardons made before the 23rd October 1689.

A condition was imposed on the tenure of the Crown. "Every person that is or shall be reconciled to, or shall hold communion with, the See or Church of Rome, or shall profess the popish religion, or shall marry a papist," is to be excluded from inheritance or possession of the throne. The people are absolved from their allegiance, and the Crown is to go to the next Protestant who would succeed if the person so reconciled to Rome were dead.

A test is imposed on the reigning king or queen, who must, either at the time of coronation or on the first day of meeting of his or her first Parliament, make the declaration against transubstantiation. No test is imposed on the king or queen consort, nor does the Bill of Rights require that the reigning sovereign should be a member of the Church of England. As to the sense in which the term "Protestant" is applied to the Church of England, see CHURCH OF ENGLAND.

**Bill of Sight.**—A document signed by the importer of goods (or his agent) where he is unable for want of full information to make a perfect entry of the goods. This document gives the best available description of the goods, and when delivered to the collector of customs is a warrant for the provisional landing of the goods. Before actual delivery to the importer, however, a perfect entry must be made (see ss. 58–61 of the Customs Consolidation Act, 1876, and Form No. 4 in Schedule B). •

**Bill of Store.**—A document used on the reimportation into the United Kingdom within five years of their exportation of goods which, if foreign, would be liable to duty. Such goods are entered by a bill of store which gives full particulars regarding them; the goods are then delivered free of duty (s. 6 of the Customs and Inland Revenue Act, 1879).

**Bill of Sufferance.**—A licence formerly granted at the custom-house to a merchant, suffering him to trade from one English port to another without paying custom dues.

**Billeting.**—In early times troops were quartered under an order from the king to the civil magistrate of the district, requiring him to provide quarters and provisions. Owing to the abuses to which it led, billeting was declared to be illegal by the Petition of Right (3 Chas. I. c. 1). In 1679, by the Act 31 Chas. II. c. 1, s. 32, it was again declared to be illegal. James II., however, issued orders for billeting. One of the grievances in the Bill of Rights (*q.v.*) (1 Will. & Mary, sess. 2, c. 2) was that soldiers had been quartered contrary to law. The practice of billeting, except under statutory authority, was discontinued.

When a standing army was authorised by Parliament after the Revolution, it became necessary to make legal provision for the accommodation of the army, as the barrack accommodation was insufficient; and, accordingly, in the year 1689, the second Mutiny Act (1 Will. & Mary, sess. 2, c. 4) authorised billeting in certain places, but not in private houses. The power thus conferred was subsequently re-enacted in every Mutiny Act, until it was embodied in Part III. of the Army Discipline and Regulation Act, 1879, now replaced by Part III. of the Army Act (44 & 45 Vict. c. 58). The Army Act is only kept in operation by virtue of an Act passed annually (see ARMY); billeting therefore continues illegal, except to the extent expressly allowed by the Army Act, and so long only as that Act is kept in operation. Billeting now is hardly ever resorted to for the regular forces, except when actually moving, and the introduction of railways has greatly diminished its necessity even on those occasions.

The principal provisions of the Army Act (44 & 45 Vict. c. 58), with reference to billeting are the following:—

Sec. 102 suspends so much of any law as prohibits or restricts or regulates the quartering or billeting of officers and soldiers on any inhabitant of the realm without his consent, so far as such quartering or billeting is authorised by the Act. The Acts 3 Chas. I. c. 1, and 31 Chas. II. c. 1, are accordingly suspended. A constable in charge of a place in the United Kingdom mentioned in the route issued to a commanding officer of the regular forces, on demand and on production of such route, is directed to billet on the occupiers of victualling houses as defined by the Act, the number of officers, soldiers, and horses mentioned in the route, and stated to require quarters. A route is issued under the authority of Her Majesty, signified through a Secretary of State. It states the forces to be moved in pursuance of the route, and has to be signified by the proper officer. A route is not to be questioned except on evidence produced to show that it has not been duly issued or signed (see s. 103).

The victualling houses which are subject to billets are all inns, hotels, livery stables, or ale houses, also the houses of sellers of wine by retail, whether British or foreign, to be drunk in their own houses or places thereunto belonging, and all houses of persons selling brandy, spirits, strong waters, cider, or metheglin by retail. But an officer or soldier is not to be billeted in certain places, as a private house or canteen held under the authority of a Secretary of State, or on vintners of the city of London who keep a tavern only; the house of a distiller kept for distilling brandy and strong waters, in which tippling is not permitted; the house of a shop-keeper whose principal dealing is more in other goods and merchandise than brandy and strong waters, but in which tippling is not permitted; the house of a person licensed only to sell beer or cider not to be consumed on the premises; the house of residence of any foreign consul. The particulars describing these excepted places are given in sec. 104 (2).

Sec. 105 sets out the officers, soldiers, and horses entitled to be billeted.

By sec. 106 the keeper of a victualling house has to furnish lodging and attendance for the officers; lodging, attendance, and food for the soldiers, and stable-room and forage for the horses. The Second Schedule of the Army Act gives particulars as to the accommodation to be furnished.

The keeper of a victualling house may, in certain cases, provide accommodation elsewhere than in his victualling house (s. 106 (2)). The prices authorised by Parliament are to be paid for the accommodation provided (s. 106 (3) (4) (5)). The Army (Annual) Act, 1896, s. 3 and the Schedule, provide for the prices to be paid to the keeper of a victualling house for the accommodation provided by him in pursuance of the Army Act.

Sec. 107 provides that the police authority for any place may make out an annual list of all keepers of victualling houses liable to billets, specifying the number of soldiers and horses who may be billeted in each house. This list is to be kept open for inspection by the parties interested, and may be amended by a Court of summary jurisdiction.

Sec. 108 provides the regulations to be observed with respect to billeting, and the powers of a constable, a justice of the peace, and a Court of summary jurisdiction in relation thereto.

The offences relating to billeting are dealt with in sec. 109. They may be committed by constables, by the keepers of victualling houses, and by officers or soldiers. Sec. 30 also provides for the punishment of certain offences committed by persons subject to military law.

Sec. 119 provides that an application may be made to a Court of summary jurisdiction in default of payment of a sum due to the keeper of a victualling house, or in the case of ill-treatment by violence, extortion, or disturbance in billets by an officer or soldier.

Sec. 179. The Royal Marines are now subject to the Army Act, subject to the modifications mentioned in the Act, and the provisions of the Army Act relating to billeting apply to them accordingly. See Army Act, s. 190 (8).

Sec. 181 (3) (4) provides for the application of the provisions relating to billeting to Her Majesty's auxiliary forces when subject to military law, but subject to certain modifications. The expression "auxiliary forces" means the militia, the yeomanry, and the volunteers. See the Army Act, s. 190 (12).

The Militia (England) Act, 1812 (52 Geo. III. c. 38), s. 100, provides for the quartering and billeting of officers, non-commissioned officers, drummers, and private men serving in the local militia at the times when they shall be called out to annual exercise, and when the local militia is not embodied nor called out to exercise, provision is made as to lodging for the permanent staff.

The Naval Volunteers Act, 1853 (16 & 17 Vict. c. 73), s. 9, enacts that the provisions for the time being in force in relation to the billeting of the Royal Marines, shall extend to the volunteers under the Act.

The Royal Naval Reserve (Volunteer) Act, 1857 (22 & 23 Vict. c. 40), s. 8, applies to volunteers under the Act the provisions for the time being in force in relation to the billeting of the Royal Marines.

The Yeomanry Act (44 Geo. III. c. 54), s. 46, provides for quartering and billeting the yeomanry. The Yeomanry Act, 1817 (57 Geo. III. c. 44), pro-

vides for the quartering and billeting of the yeomanry when assembled for the suppression of riots.

See the *Manual of Military Law*; Clode, *Military Forces of the Crown*.

**Billiards.**—1. Persons licensed under the Licensing Acts (see INTOXICATING LIQUOR) may have billiard tables or bagatelle boards on their premises without special licence (8 & 9 Vict. c. 109, s. 11; 35 & 36 Vict. c. 94, s. 75).

2. Under the Gaming Act, 1845, 8 & 9 Vict. c. 109, persons who have not a licensed victualler's licence must have a licence to authorise their keeping a public billiard table or bagatelle board or any instrument used in any game of the like kind. Justices of the peace at their annual licensing sessions may grant, and at their special licensing sessions may transfer, such licences. This power has not been taken away from the justices by the Local Government Acts of 1888 or 1894. The form of licence to be granted is scheduled to the Act of 1845. It prohibits the consumption on the premises of any exciseable liquor, except beer and "sweets" (Sched. iii.). It is annual, running from April 5 in London, Surrey, and Middlesex, and from October 10 in other counties (*Jones v. Whittaker*, 1870, L. R. 5 Q. B. 541; *R. v. Lancashire Justices*, 1857, 7 El. & Bl. 839). The effect of these provisions is preserved by 43 & 44 Vict. c. 20, s. 47.

The notices to be given and received by applicants for or holders of billiard licences are the same as those to be given and received in the case of liquor licences (8 & 9 Vict. c. 109, s. 10; 35 & 36 Vict. c. 94, s. 75). There is no appeal from the refusal of the justices to grant the licence (*Ex parte Chamberlain*, 1858, 8 El. & Bl. 644). The fees on the grant of the licence are 1s. for the constable for serving notices, and 5s. for the justice's clerk (8 & 9 Vict. c. 109, s. 10).

3. During the continuance of the licence the holder must put and keep up the words "licensed for billiards" in some conspicuous place near the door. And a person who keeps the house without a licence, or without exhibiting these words, is liable to indictment for keeping a common gaming house (see GAMING), or on a summary conviction for keeping an unlicensed billiard table, to pay a penalty not exceeding £10 per diem for each day on which the offence is adjudged to have been committed (8 & 9 Vict. c. 109, s. 11).

If he offends against the tenor (*i.e.* conditions) of the licence, he is liable on summary conviction to the same penalties as for conviction under the Licensing Act, 1872, 35 & 36 Vict. c. 94, for suffering any gaming or unlawful game to be carried on on the premises (8 & 9 Vict. c. 109, s. 12; 35 & 36 Vict. c. 94, ss. 17 (1), 75). Though billiards is a lawful game, if the keeper of a public table allows money to be staked at any hour, whether the persons playing are customers or private friends, he is liable to conviction for suffering gaming (*Dyson v. Mason*, 1889, 22 Q. B. D. 351).

The holder of a victualler's licence must not (but a beerhouse keeper may) allow billiards to be played even by a guest or lodger at hours when the house is not permitted to be open for the sale of intoxicants (8 & 9 Vict. c. 109, s. 13; *Ovenden v. Raymond*, 1875, 34 L. T. 699; *Bent v. Lister*, 1888, 52 J. P. 389; 4 T. L. R. 493).

The licensee, (whether a victualler or not) must not play or allow play upon a public billiard table, etc., after 1 a.m., or before 8 a.m., or on Sunday, Christmas Day, Good Friday, or any day appointed for a public fast or

**thanksgiving.** Breach of this regulation is an offence against the tenor of the licence (8 & 9 Vict. c. 109, s. 13).

The police are entitled to visit every public billiard room, and refusal or failure to admit them is an offence against the tenor of the billiard licence, or victualler's licence, under which the room is kept (8 & 9 Vict. c. 109, s. 14).

An appeal lies to Quarter Sessions against a conviction for any offence as to a public billiard table. The procedure is regulated by the Summary Jurisdiction Act, 1879, and the expenses of witnesses for the respondent on an unsuccessful appeal may be defrayed out of the local rate (8 & 9 Vict. c. 109, s. 20; 42 & 43 Vict. c. 49, ss. 31, 49; 47 & 48 Vict. c. 43, s. 6). See **APPEALS** (to Quarter Sessions). A summary conviction or order on appeal cannot be removed by *certiorari* (8 & 9 Vict. c. 109, s. 21). See **CERTIORARI**.

## Bills of Exchange.

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### INTRODUCTION.

Bills of exchange, with cheques and promissory notes (as to which see separate articles), constitute a paper currency to which special characteristics, unknown to the common law, were attached by the law merchant (*q.v.*). The most important of these are negotiability, presumption of consideration, certain other presumptions and estoppels directed to enable a "holder in due course" (see below, III.) to take and hold the paper without being pre-

judiced by any defect, irregularity, or special arrangement between earlier parties of which he is not aware at the time, and the concession of days of grace. By virtue of the form of contract, the property in the sum payable is transferable by the mere delivery, or delivery and indorsement, of the bill and (in the case of a negotiable bill) the contract itself is made ambulatory, so that when a bill has been drawn, accepted, indorsed, and negotiated through several hands, the holder may recover against any of the previous parties who are severally liable to him, and as between them, under implied contracts of indemnity, the liability may be brought home to the party intended to be ultimately subjected to it. Special varieties of bills, of which non-negotiable bills are the most important, are also recognised, in which some one or more of the normal characteristics above alluded to are wanting. The law of bills, cheques, and notes has been codified by the Bills of Exchange Act, 1882, and in some particulars amended (as to which see Chalmers on *Bills of Exchange*, 5th ed.,—hereinafter referred to as Chalmers,—p. 2, and Byles on *Bills*, 1892). The Act is the final authority, so that earlier cases are of no weight if they are inconsistent with what is clearly laid down by it. They are only of assistance in cases of ambiguity (*Bank of England v. Vagliano* [1891], App. Cas. at p. 144; cp. *In re Budgett* [1894], 2 Ch. at p. 561). The Act preserves the rules in bankruptcy relating to bills, notes, and cheques; and the rules of the common law, including the law merchant, except so far as they are inconsistent with its express provisions, and also those of the Stamp Acts (see below, XIII.) and Companies Act, 1862 (see below, XII.), (s. 97). The following article is a summary of the Act (in great measure in its own words), so far as it relates to bills of exchange. The numbers refer to sections of the Act.

#### I. FORM AND INTERPRETATION.

*Definition, Drawer, Drawee, Payee.*—A bill of exchange (hereinafter called “a bill”) is defined to be an unconditional order in writing (or print (s. 2)), addressed by one person (the “drawer”) to another (the “drawee”), signed by the person giving it, requiring the person to whom it is addressed (the drawee) to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person (the “payee”) or to bearer (s. 3 (1)). It must not require any other act to be done in addition to the payment (s. 3 (2)), or restrict the payment to payment out of a particular fund, but it may indicate the fund intended to be used, or the purpose of the payment (s. 3 (3)). The several requirements of the definition are explained in the later sections of the Act summarised or set out below. They are exhaustive, so that a bill may be undated (that is unless the date of the bill is required to fix the time for payment), and without the usual words “value received,” and may specify neither the place of its origin or of payment (s. 3 (4)). And any language or wording may be employed which fulfils the conditions of the definition. The bill is intended to be completed by the acceptance of the drawee (see below), who after acceptance is called the “acceptor,” but it exists as a bill before acceptance, and may be sued upon (see below, VII., *Drawer's Contract*). The following is an ordinary form of an inland bill, that is a bill which is, or purports to be, drawn and payable within the British Isles, or drawn there upon some person there resident. (Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill (s. 4), (see below, XI.). The form purports to have been accepted. Indorsements (below, IV.) would be written on the back. The words in italics are not necessary, and do not affect the operation of the bill. Those in brackets, of course, are



not part of the bill; they are put to indicate the parties. In the case of any discrepancy between figures and words the latter govern (s. 9 (2)).

£100.

Three months after date payable to E. F. (payee) or his order the sum

of one hundred pounds sterling value payable.

To C. D. (drawee) of  
No. 1 Fleet Street in  
the City of London.

Accepted payable  
at the Bank of England  
(Signed) C. D. (acceptor)

A. B. (drawer)  
of No. 100 Strand,  
London.

*Drawer, Drawee, Payee.*—Some of the different parties to a bill may be the same person. Where the drawer and drawee are the same person, or the drawee is a fictitious person, or is unable to contract, the holder may treat the bill as a promissory note (*q.v.*) (s. 5). The drawee must be named or otherwise indicated with reasonable certainty (s. 6 (1)); so also the payee, where the bill is not payable to bearer (s. 7 (1)). There may be several drawees whether partners or not, but a bill cannot be addressed to them in the alternative, or in succession (s. 6 (2)). A substitutional drawee, called a "referee in case of need," may be added, to whom, at his option, the holder may resort if the bill is dishonoured by non-acceptance or non-payment (s. 15). A bill may be made payable to two or more payees jointly, or in the alternative to one or some of them, or to the holder of an office for the time being (s. 7 (2)). Where the payee is a non-existing person, or a fictitious person, the bill may be treated as payable to bearer (s. 7 (3)). The effect of this is that no indorsement is needed to charge the acceptor. It was held in the most important case decided upon the Act (*Bank of England v. Vagliano* [1891], App. Cas. 107), that if the name of a real person is made use of by a forger as that of the payee, and the person has not, and is never intended to have anything to do with the bill, although the acceptor is induced to accept by a belief that the person referred to has drawn the bill, the bill is within the subsection and payable to bearer (see also *Clutton v. Attenborough* [1895], 2 Q. B. 306, 707; [1897], App. Cas. 90.).

*Not Negotiable, to Bearer, to Order.*—A bill is not negotiable if it contains words prohibiting transfer or indicating an intention that it should not be transferable (s. 8 (1)). In the absence of such words it is payable to the payee specified (even though drawn to his order only (s. 8 (4)), or at his option (whether so stated or not (s. 8 (5)) to his order. Where an acceptor added the words "in favour of drawer only" to his acceptance, the bill was held to be negotiable and payable to order nevertheless (*Decroix v. Meyer*, 1890, 25 Q. B. D. 343; [1891], App. Cas. 520). A bill is payable to bearer which is so drawn, or on which the last indorsement is in blank (s. 8 (3)); that is to say is a signature without a direction to pay to a particular person preceding it (below, IV., *Indorsement*).

*Sum payable.*—The "sum certain" (see definition) may be made payable with interest at any agreed rate, which, unless the bill otherwise provides, runs from the date of the bill, or its issue if there is no date (s. 9 (3)); and either in one sum or by stated instalments with or without a provision for the whole to become due on default in payment of any instalment; and according to any indicated or ascertained rate of exchange (s. 9 (1)) (see below, XI.). If there is a discrepancy between the words and figures, the sum denoted by the words is payable (s. 9 (2)).

*Time for Payment, Demand, after Sight, Date.*—A bill is payable on demand when it is expressed to be payable on demand, or at sight, or on presentation, or when no time for payment is expressed (s. 10 (1)); and where a bill is accepted or indorsed when it is overdue, as regards the acceptor or any indorser who so accepts or indorses it, it is payable on demand (s. 10 (2)). The time for payment may be at a fixed period after date or sight, or after the occurrence of a specified event which is certain to happen (s. 11). For instance, "one year after my death" is, but "when I am in good circumstances" (*Roffey v. Greenwell*, 1839, 10 Ad. & E. 222; *Ex parte Tootell*, 1798, 4 Ves. 372) is not such a fixed or determinable future time as the definition requires.

Where a bill payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert the true date of issue or acceptance, and the bill is payable accordingly (s. 12). And if the holder in good faith and by mistake inserts a wrong date, and, in every case where a wrong date is inserted if the bill comes subsequently into the hands of a holder in due course, the bill is not avoided by the wrong date, but operates and is payable as if it were the true date (s. 12). Any date on a bill is presumed, unless the contrary is proved, to be correct (s. 13 (1)), and a bill is not invalidated by reason only that it is ante- or post-dated or dated on a Sunday (s. 13 (2)). Where the bill is payable at a fixed period after date, after sight, or after the happening of a specified event the day from which the time runs is excluded, and the day of payment is included in the period (s. 14 (2)). "Sight" means the date of acceptance if the bill be accepted, or the date of noting or protest, if it be noted or protested for non-acceptance or non-delivery (s. 14 (3)). "Month" in a bill means calendar month (s. 14 (4)).

*Days of Grace, Holiday.*—Where the bill is not payable on demand, three days of grace are (in every case where the bill does not otherwise provide) added to the time of payment as fixed by the bill. No action can be commenced for payment until after the expiry of the last day of grace (*Kennedy v. Thomas* [1894], 2 Q. B. 759). If the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by royal proclamation as a public fast or thanksgiving day, the bill is due and payable on the preceding business day, except that if the last day of grace is a bank holiday (other than Christmas Day or Good Friday, see BANK HOLIDAYS), or is a Sunday, and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day (see BUSINESS DAY) (s. 14 (1)).

*Restriction of Liability.*—The drawer, and any indorser, may insert an express stipulation negating or limiting his own liability to the holder, e.g. by adding to an indorsement the words "without recourse" or waiving as regards himself some or all of the holder's duties, e.g. notice of dishonour (s. 16).

*Acceptance.*—Only the drawee can accept the bill (i.e. except an "acceptor for honour," who accepted it after protest, s. 65). He accepts it by signing his name upon it with or without words signifying his assent to the order of the drawer (but not undertaking to perform his promise by any means other than the payment of money) (s. 17), and by delivery or notification (see below, *Delivery*). It is sufficient if the drawee accept by his agent authorised to accept (s. 91), see below, II. The acceptance may be made at any time, e.g. before the drawer signs the bill or after dishonour or maturity (s. 18). It may be *general* or *qualified*, that is to say, it may contain words expressly (by clear and unequivocal language (*Meyer v. Decroix*

[1891], App. Cas. 520)) varying the effect of the bill as drawn (the holder may refuse a qualified acceptance, see below, VI.). The Act gives the following examples of a qualified acceptance: to pay subject to a condition (*e.g.* the arrival of a cargo); part of the amount drawn for; at a particular place only (the word "only," or its equivalent, is essential to limit payment to a particular place (s. 19 (2 c)); at a different time; by one or more, not being all of the drawees (s. 19).

As to *acceptance* and *payment for honour*, see secs. 65 to 68 of the Act, and **HONOUR**.

*Delivery.*—Every contract on a bill, whether the drawer's, acceptor's, or an indorser's, is incomplete and revocable until delivery of the bill in order to give effect thereto, except that where an acceptance is written on a bill and the drawee gives notice to, or according to the directions of the person entitled to the bill that he has accepted it, the acceptance is complete and irrevocable (s. 21 (1)). But where a bill is no longer in the possession of a party who has signed it, a valid and unconditional delivery is presumed until the contrary is proved (s. 21 (3)), and if it be in the hands of a "holder in due course" (see below, III.), a valid delivery by all prior parties is conclusively presumed in his favour (s. 21 (2)). As between other parties or holders, it may be shown that the delivery was not made by or under the authority of the party drawing, accepting, or indorsing, or was conditional, or for a special purpose only, and not for the purpose of transferring the property in the bill (s. 21, and see **ESCROW** and **STOLEN BILL**). *E.g.* in an action by the payee, the acceptor may show that he delivered the bill as security for an account only. But any contemporaneous agreement alleged which varies the contract of the bill must be in writing (see Chalmers, pp. 57 and 59; *Maillard v. Page*, 1870, L. R. 5 Ex. 312; *Young v. Austen*, 1869, L. R. 4 C. P. 553, and **PAROL VARIATION**). See below, IV., *Indorsement*.

## II. CAPACITY AND AUTHORITY OF PARTIES.

*Capacity* to incur liability on a bill is coextensive with capacity to enter into any ordinary contract (s. 22 (1), see **CONTRACT**). An infant's acceptance is void even if given for necessities (*In re Soltykoff* [1891], 1 Q. B. 413).

*Corporation.*—The section last cited does not affect the capacity of a corporation to make itself liable as a party to a bill (s. 22 (1)), and the general rule is that a corporation may issue bills only where the terms of the instrument under which it is constituted authorise, upon a fair construction, the issuing bills, or where the business of the corporation is one which cannot, in its ordinary course, be carried on without bills (*Peruvian Ry. Co. v. Thames Insurance Co.*, 1867, L. R. 2 Ch. 617; see in Buckley on *Companies* the notes to the Companies Act of 1862, s. 47; Chalmers, p. 63; and **CORPORATION**). A corporation may seal instead of signing (s. 91). Where a bill is drawn or indorsed by an infant or a corporation without power to incur liability upon it, the holder can enforce the bill against any other party to it (s. 22 (2)). As to limited companies, see further below, XII.

*Signature, Forged Signature, by Procurator.*—No one is liable as a party unless he has signed the bill as such by himself or his agent (s. 91), but signature in an assumed or in a trade-name is sufficient, and the signature of a firm-name is equivalent to that of all the partners (s. 23). So that if an agent signs in his own name, he, and not his principal, is liable on the bill. As to the authority of an agent to accept, see *Odell v. Cormack Brothers*, 1887, 19 Q. B. D. 223, where the agent to wind up a partnership was held not to be authorised to accept bills so as to bind the partners.

As to the manager of a company and a liquidator, see below, XII. A forged or unauthorised and unratified signature is wholly inoperative except against a person who is estopped from setting up the forgery or want of authority (s. 24). The acceptor cannot dispute the genuineness of the drawee's signature or his authority (s. 54 (2)), nor can an indorser dispute the genuineness or regularity of the drawer's signature or of previous indorsements (see below, VII.). (As to the protection of bankers, see BANKER AND CUSTOMER (vol. i. p. 479), and CHEQUE.) A forgery cannot be ratified (*Brook v. Hook*, 1871, L. R. 6 Ex. 89). If money is paid to the innocent holder of a bill who makes his title through forged indorsements, it cannot be recovered from him after such an interval of time that his position may have changed (*London and River Plate Bank v. Bank of Liverpool* [1896], 1 Q. B. 7). Where a bill is signed by an agent "by procuration" (p.p. or per proc.), the principal is only bound by the signature, if the agent was acting within the actual limits of his authority (s. 25), and the addition casts upon the taker of the bill the duty of inquiring into the agent's authority (*Bryant v. Banque du Peuple* [1893], App. Cas. 170). The agent so signing is not liable *on the bill*, even though he have no authority (see PRINCIPAL AND AGENT). As to the liability for signing a bill on behalf of a limited company irregularly, see below, XII. Where anyone signs as agent or in a representative capacity, and adds words to the signature so stating, he is not personally liable on the bill, but the mere addition of a description which describes him as agent, or as filling a representative capacity, does not exempt him from personal liability (s. 26 (1)). In determining whether the signature is that of the principal or agent, the construction most favourable to the validity of the instrument is to be adopted (s. 26 (2)).

### III. CONSIDERATION.

*Holder for Value.*—Where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties, whether they became parties prior to that time (s. 27 (2)). A holder who has a lien on a bill is a holder for value to the extent of the sum secured (s. 27 (3)).

A "Holder in due course" is a holder who has taken a bill complete and regular on the face of it (this includes the holder of a post-dated cheque bearing only a penny stamp (*Hitchcock v. Edwards*, 1889, 60 L. T. 636; *Royal Bank of Scotland v. Tottenham* [1894], 2 Q. B. 715)) before it was overdue (and without notice that it had previously been dishonoured, if such were the fact), and in good faith (*i.e.* honestly, whether negligently or not (s. 90)), and for value, and without notice of any defect in the title of the person who negotiated it to him, as, for example, that such person obtained the bill or acceptance by unlawful means, or for illegal consideration, or is negotiating it in breach of faith or fraud (s. 29). By notice, actual notice or actual suspicion, not mere constructive notice is here meant (*Chalmers*, p. 90; see BANK-NOTE (5)).

*Presumption, Onus of Proof.*—Every party is *prima facie* deemed to have become a party for value, and every holder to be a holder in due course. But if in an action on the bill it is proved (to the satisfaction of the judge) or admitted that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill (s. 30 (2)) (*Tatam v. Haslar*, 1889, 23 Q. B. D. 345). See ACCOMMODATION BILL (vol. i. p. 65). •

## IV. NEGOTIATION.

*Negotiation, Indorsement.*—A bill is negotiated when it is transferred from one person to another so as to constitute the transferee holder. So that, while a bill payable to bearer is negotiated by mere delivery, a bill to order requires also the indorsement of the holder (s. 31). If a bill to order is transferred for value without indorsement, the transfer gives the transferee such title as the transferor had, and also the right to have the bill indorsed by the transferor (*Day v. Longhurst*, 1893, W. N. 3; s. 31 (4)), but not authority to indorse it with the latter's name himself (*Harrop v. Fisher*, 1861, 10 C. B. N. S. 196). The indorsement required for negotiation must be effected by the indorsee signing his name, with or without additional words (as to which, see below), upon the bill, or a slip attached thereto (called an "ALLONGE" (*q.v.*)) or on a copy (in countries where copies are recognised (s. 32 (1)). It must not purport to transfer part only of the amount payable (s. 32 (2)), and it must be an indorsement by, or under the authority of, all the payees or indorsees to whose order the bill is payable, where they are not partners (s. 32 (3)). If the indorsee is wrongly designated, or his name is misspelt, on or in the bill, he may indorse it as he is there described, adding, if he thinks fit, his proper signature (s. 32 (4)). Indorsements are presumed to have been made in the order in which they appear (s. 32 (5)).

A conditional indorsement may be treated by the payer as unconditional (s. 33).

Indorsements are either special, that is such as to specify the payee (*e.g.* "pay A. B.," "pay A. B. or order"), or in blank. Bills indorsed in blank are payable to bearer, bills specially indorsed require indorsement by the indorsee on further negotiation, and an indorsement in blank may be made special by any holder writing a direction to pay to, or to the order of some person above the indorsee's signature (s. 34). Further, an indorsement may restrict the further negotiation of the bill (as "pay A. B. only"), or may confer merely an authority to deal with the bill as directed by it without transferring the ownership (as "pay A. B. or account of X."). Such an indorsement gives the indorsee a right to sue and be paid but not to transfer, unless it expressly authorises him to transfer. And in the last case all subsequent indorsees take the bill with the same rights and liabilities as the first indorsee under the restrictive indorsement (s. 35).

*Overdue and Dishonoured Bill.*—Negotiation of a bill after maturity confers a title to it subject to all defects affecting it at maturity, and no one who then takes it can acquire or give a better title than the person from whom he took it had (s. 36 (2)). "Defect in title" in this section is equivalent to the more common phrase, "equity attaching to the bill." 'Mere absence of consideration or right of set-off (*Ex parte Swan*, 1868, L. R. 6 Eq. 344) is not such an equity, but an agreement not to negotiate is (*Parr v. Jewell*, 1855, 16 C. B. 684). See ASSIGNMENTS OF CHOSES IN ACTION (vol. i. p. 361). The rule does not apply where the bill is negotiated, under the law of a country which treats current and overdue bill alike (*Alcock v. Smith* [1892], 1 Ch. 238). For the purposes of the rule a bill payable on demand is overdue when it appears on the face of it to have been in circulation for an unreasonable length of time (s. 36 (3)). Unless an indorsement is dated as after maturity, negotiation is *prima facie* deemed to have been effected during currency (s. 36 (4)). Anyone who takes a bill which has been dishonoured before maturity (*e.g.* by non-acceptance), with notice of the fact, takes it subject to any defect of title attaching to it at the time of

such dishonour (s. 36 (5)). The subsection expressly preserves the rights of a holder in due course.

Where the bill is negotiated back to the drawer, acceptor, or a prior indorser, he **may** (subject to the provisions of the Act, see below, VIII., *Discharge*) reissue and further negotiate it, but he cannot enforce payment from any intervening party to whom he was himself previously liable.

#### V. RIGHTS AND POWERS OF HOLDER.

The "holder" (*i.e.* the payee or indorsee in possession of a bill to order, or the possessor of a bill to bearer) may sue in his own name, and, if he is a "holder in due course" (see above, III.), enforce payment against all parties liable on the bill, notwithstanding any defect of titles prior to his own, or defences of such parties as between themselves, and, although his own title be defective if he negotiates the bill to a holder in due course he confers a good title, and if he obtains payment in due course the payer is discharged (s. 38) (see further Chalmers, pp. 123 to 130, where the different cases are well worked out). Where the holder is suing wholly or in part for the benefit of another, any defence against that other is available *pro tanto* against the holder (*ibid.* p. 123; *Thornton v. Maynard*, 1875, L. R. 10 C. P. 695). Any BEARER (*i.e.* possessor of a bill to bearer) can sue on a bill payable to bearer, but only the payee or indorsee, or his legal representative, can sue on a bill payable to him or to his order.

#### VI. GENERAL DUTIES OF HOLDER.

Subject to any special provision in the bill, the holder is bound to use reasonable diligence (that is, to do the acts required within a reasonable time, having regard to usage and the facts of the case (ss. 39 (4), 40 (3), 45), to fulfil the duties of presentment for acceptance and payment, giving notice of dishonour, and noting or protesting next stated, under penalty of losing the right to sue either upon the bill or the consideration given for it (*Peacock v. Purcell*, 1863, 32 L. J. C. P. 266). He is not bound to fulfil the duties if, by reasonable efforts and care, he cannot do so (ss. 41 (2 b), 45, 46 (1)).

*Presentment for acceptance* is necessary (a) where the bill is payable after sight; (b) where it expressly stipulates for such presentment; and (c) where it is drawn payable elsewhere than at the drawee's residence or place of business, but in no other case (s. 39). The bill is, of course, usually presented in any case, in order to obtain the drawee's acceptance and so secure his liability. In case (c) presentment for acceptance, before presentment for payment on the day when the bill falls due, is excused (so that the drawer and indorser are not discharged) if the holder had not time to so present it (s. 39 (4)). In case (a), in the absence of excuse (see below), the bill must be presented for acceptance or negotiated within a reasonable time after negotiation to the holder, or the drawer and prior indorsers are discharged (s. 40).

The presentment must be made *by*, or on behalf of the holder; to the drawee or someone authorised to accept or refuse acceptance on his behalf, at a reasonable hour on a business day and before the bill is overdue (see BUSINESS DAY). If there are two or more drawees, not partners, it must be made to all or to one who has authority to accept for all. If the drawee is dead, it may be made to his legal representative; and if he is bankrupt, to him or to his trustee (s. 40 (1)). Where authorised by agreement or usage, it may be effected through the post (s. 41 (1 e)). It is excused, and the bill may be treated as dishonoured by non-acceptance, where the drawee

is dead, or bankrupt, or is a fictitious person, or a person without capacity to contract by bill (see above, II.); where it cannot by reasonable diligence be effected; where, on an irregular presentment, acceptance has been refused on some other ground (s. 41 (2)). If the bill is not accepted within the customary time (twenty-four hours, or from Saturday to Monday, Chalmers, p. 138), the person presenting it must treat it as dishonoured (s. 42). Dishonour by non-acceptance, or by the fact of non-acceptance where presentment is excused, gives the holder an immediate right of recourse against the drawer and indorsers, and no presentment for payment is necessary (s. 43).

The holder may refuse a qualified acceptance (see above, I.), and, if he does not obtain an unqualified acceptance, treat the bill as dishonoured (s. 44 (1)). If he take a qualified acceptance, any drawee or indorsee who has not authorised (*e.g.* by the bill) or assented to this, is discharged, but this rule does not apply to a partial acceptance (*i.e.* an acceptance as to part), provided the holder gives notice to the drawer and indorsers, and, in the case of a foreign bill, protests as to the balance (s. 44.(2)). And in any case where a drawer or indorser receives notice of a qualified acceptance and does not within a reasonable time express his dissent to the holder, he is deemed to have assented to it (s. 44 (3)).

*Presentment for payment* must be duly made, by exhibiting the bill, and giving it up upon payment (s. 52 (4)), unless it is excused (see below), or the drawer or indorsers will be discharged (s. 45). (As to the acceptor, see below.) The presentment must be *on* the day when the bill falls due, or if it is payable on demand within a reasonable time after its issue, to render the drawer liable, and within a reasonable time after its indorsement, to render the indorser liable (s. 45 (1) (2)); *by* the holder or his agent; *at* a reasonable hour on a business day; *at* the proper place (see below); and *to* the payer designated or some person authorised to pay or refuse payment on his behalf if such person can be found there (s. 45 (3)). If no such person can be found, no further presentment to the drawee or acceptor is required (s. 45 (5)). The proper place is the place of payment specified in the bill, if any; failing this, the address of the drawee or acceptor so specified, if any; failing both, the drawee's or acceptor's place of business, if known, and if not, his ordinary residence, if known; in any other case, wherever the drawee or acceptor can be found, or his last known place of business or residence (s. 45 (4)). Where there are two or more drawees or acceptors, not partners, and no place of payment is specified, presentment must be made to all (s. 45 (6)). And where the drawee or acceptor is dead, and no such place is specified, it must be made to a personal representative, if such exist and can be found (s. 45 (7)). Presentment for payment is not necessary to charge the acceptor, unless it is required by the terms of the acceptance. In the latter case, it is not required on the day of maturity unless expressly so stipulated (s. 52).

Where authorised by agreement or usage, a presentment through the Post Office is sufficient. Such usage exists in England (Byles on *Bills*, 14th ed., p. 21 *n.*; *Prideaux v. Criddle*, 1869, L. R. 4 Q. B. 455; *Heywood v. Pickering*, 1874, L. R. 9 Q. B. 428).

Delay is excused if not due to the holder's fault, and if he presents as soon as he reasonably can (s. 46 (1)). Presentment (for payment) is excused altogether where it cannot be effected (but not because the holder believes the bill will be dishonoured); and where the drawee is a fictitious person; and by waiver, express or implied (either before or after time for presentment). And, as regards the drawer, where the drawee or acceptor

is not bound as between himself and the drawer to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented. (See *CHEQUE*.) As regards an indorser, where the bill was accepted or made for his accommodation, and he has no reason to expect that it would be paid if presented (s. 46).

A bill is dishonoured by non-payment when it is duly presented and payment is refused or cannot be obtained, or when, presentment being excused, the bill is overdue and unpaid. Subject to the rules as to acceptance and payment for honour (ss. 65-68), upon dishonour by non-payment an immediate right of recourse against the drawer and indorsers accrues to the holder (s. 47).

*Notice of Dishonour.*—Any drawer or indorser to whom notice is not duly given is discharged unless notice is excused (see below). Provided that where a bill is dishonoured by non-acceptance, and notice is not given, the rights of a subsequent holder in due course are not prejudiced; and in the like case if due notice is given, it is not necessary to give notice of subsequent dishonour by non-payment, unless the bill shall in the meanwhile have been accepted (s. 48).

The notice must be given *by*, or on behalf of the holder, or by, or on behalf of an indorser, who is liable on the bill at the time. It may be given by an agent either in his own name or in the name of any party entitled to give notice. Where it is given by the holder, it enures for the benefit of all subsequent holders and prior indorsers who have a right of recourse against the person to whom it is given; where it is given by an indorser, for the benefit of the holder and all indorsers subsequent to the party to whom it is given. It may be in writing or not, and in any terms identifying the bill and the nature of the dishonour. The return of the dishonoured bill is sufficient notice in point of form. It need not be signed, and it is not vitiated by a misdescription of the bill unless the party receiving it is misled thereby. Notice to an agent authorised to receive it is sufficient. If the drawer or indorser is known to be dead, it must be given to his personal representative if, with reasonable diligence, he can be found. Where the drawer or indorser is bankrupt, it may be given to him or his trustee. Where there are two or more drawers or indorsers, not partners, notice must be given to each unless one has authority to receive it for the others. It must be given within a reasonable time, *i.e.* in the absence of special circumstances, if giver and receiver reside in the same place, on the day after the dishonour; if they reside in different places, a notice must be posted on the day after the dishonour, or, if there is no convenient post on that day, by the next post thereafter. An agent in whose hands a bill is dishonoured may give notice to the parties or to his principal. In the latter case he must do so as if he were holder, and the principal must give notice as if the agent had been an independent holder. Thus, branch banks are treated for this purpose as independent banks (see *Prince v. Oriental Bank*, 1878, 3 App. Cas. 325). A party receiving due notice has, after such receipt, the same time for giving notice to antecedent parties as the holder had. It is sufficient that due notice is posted (s. 49).

Delay is excused if not due to the party's fault, and if he gives notice as soon as he reasonably can (s. 50 (1)). Notice is dispensed with where, with reasonable diligence, it cannot be given or does not reach the party; by waiver, express or implied, either before or after time for notice. As regards the drawer: where drawer and drawee are the same person; where the drawee is a fictitious person or is without capacity to contract; where the drawer is the person to whom the bill is presented for payment; where



the drawee or acceptor is as between himself and the drawer, under no obligation to accept or pay the bill (see ACCOMMODATION BILL); where he has countermanded payment. As regards the indorser: where the drawee is a fictitious person or is without capacity to contract, and the indorser was aware of the fact when he indorsed the bill; where the indorser is the person to whom the bill is presented for payment; where it was accepted or made for his accommodation (s. 50).

In order to render the acceptor liable, no notice of dishonour (or protest, see next paragraph) is required (s. 52 (3)).

*Protest and Noting.*—An inland bill may be noted for non-acceptance or non-payment (this is only useful as a preliminary to acceptance or payment for honour). A foreign bill, appearing on the face of it to be such, must be protested for dishonour, or the drawer and indorsers are discharged. Protest is dispensed with where notice of dishonour would be dispensed with; and delay in noting or protesting is excused, where it is not it is due to the holder's fault, and he effects it as soon as he can (s. 51). Where protest is required, and the bill is noted for protest in time, the protest may be extended at any time (s. 93). If a notary cannot be found to act, a certificate of any householder or substantial resident, signed by two witnesses, may be substituted (s. 94.) The Act gives a form of such certificate (see PROTEST).

#### VII. LIABILITIES OF PARTIES.

A bill is not of itself an assignment of funds in the drawee's hands; the rule is different in Scotland (s. 53 (2)). The drawee is not liable on the bill till he accepts it (s. 53).

*The acceptor's contract* is to pay according to the tenor of his acceptance (s. 54 (1)). The acceptor is estopped from denying as against a holder in due course: the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill. And if the bill is payable to order, the then capacity of the payee to indorse, but not the genuineness or validity of his indorsement (s. 54 (2)). The acceptor is under no duty to take precautions to prevent the fraudulent alteration of the bill after acceptance (*Scholfield v. Londesborough* [1896], App. Cas. 514, and see below VIII., *Alteration*).

*The drawer's contract* is that the bill shall be accepted and paid according to its tenor, and that if it is dishonoured, he will compensate the holder or any indorser who is compelled to pay it. He is estopped from denying as against a holder in due course the existence of the payee and his then capacity to indorse (s. 55 (1)).

*The indorser's contract* is the same as that of the drawer, but is limited to the holder and subsequent indorsers. He is estopped from denying as against a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements. And he is also estopped from denying, as against his immediate or a subsequent indorsee, that the bill was, at the time of his indorsement, valid and subsisting, and his title to it (s. 55 (2)).

*Stranger Indorser.*—Anyone who signs a bill otherwise than as drawer or acceptor is liable to a holder in due course as an indorser (s. 56). A bill which is backed by someone merely as surety is called on the Continent an AVAL (see Chalmers, p. 189; and *Steele v. M'Kinlay*, 1880, 5 App. Cas. 754).

*Damages on Dishonoured Bill.*—The holder from any party liable, the drawer (who has been compelled to pay)—from the acceptor, and an indorser

(who has been compelled to pay)—from the acceptor, drawer, or a prior indorser, may recover as liquidated damages (*Dando v. Boden* [1893], 1 Q. B. 318) the amount of the bill, interest (from presentment for payment if the bill is payable on demand and otherwise from maturity), and the expense of noting and protest (if required and effected); or if the bill was dishonoured abroad, instead of such damages, re-exchange (Chalmers, p. 193) (s. 57). In the last case, interest by way of damages cannot be recovered (*In re Commercial Bank of S. Australia*, 1887, 36 Ch. D. 522). Re-exchange can be recovered from an acceptor in England who dishonours the bill here (*In re Gillespie*, 1885, 16 Q. B. D. 702; 18 Q. B. D. 286). Interest after dishonour may, if justice requires it, be withheld or given at a different rate to that reserved (s. 57 (3)).

*The transferor of a bill payable to bearer* is not liable on the bill unless he indorses it, but by negotiating it for value he warrants to his transferee that the bill is what it purports to be, and that he has a right to transfer it, and is not then aware of any fact which renders it valueless (s. 58).

### VIII. DISCHARGE OF BILL.

When the bill is discharged all rights of action upon it are extinguished and it ceases to be negotiable.

*Payment* at or after maturity to the holder of the bill, in good faith (*i.e.* honestly, whether negligently or not (s. 90)), and without notice that his title is defective, if made by or on behalf of the drawer or acceptor, is a discharge. Payment by the drawer or an indorser does not discharge the bill (unless the party paying is the party accommodated, the bill being an accommodation bill (s. 59 (3))); but where the bill is payable to a third party or his order and is paid by the drawer, the drawer may not re-issue the bill but may enforce payment against the acceptor; where a bill is paid by an indorser (or where a bill payable to drawer's order is paid by the drawer), the payer is remitted to his former rights as regards the acceptor or antecedent parties, and may strike out his own and subsequent indorsements and again negotiate the bills (s. 59).

As to payment of a bill to order drawn on a banker bearing a forged indorsement (s. 60), and payment of forged bills, see **BANKER AND CUSTOMER**.

*Bill in Acceptor's Hands*.—When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged (s. 61).

*Waiver or Renunciation*.—When the holder at or after maturity absolutely and unconditionally, by writing (which records the actual renunciation, and is not a mere intention to effect it, *In re George*, 1890, 44 Ch. D. 627) or by delivery up of the bill to the acceptor or his personal representatives (*Edwards v. Walters* [1896], 2 Ch. 157), renounces his rights against the acceptor, the bill is discharged. The liabilities of any party to the bill may in like manner be renounced at any time. No renunciation affects the rights of a holder in due course without notice of it (s. 62).

*Cancellation*.—Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent on it, the bill is discharged. And any party liable may be discharged by such cancellation of his signature, the discharge operating to discharge also any indorser who would have a right of recourse against him. If any cancellation is inoperative because it is made unintentionally, or under a mistake, or without the holder's authority (as to the authority of an agent to collect to cancel, see *Bank of Scotland v. Dominion Bank* [1891], App. Cas. 592), and the cancellation is apparent, the

burden of proof that it was so made is upon the party who alleges that it is inoperative (s. 63).

As to discharge by material alteration, see s. 64, and BANK-NOTE (4).

As to discharge of a party who is surety only, by dealings with the principal debtor, see PRINCIPAL AND SURETY.

#### IX. LOST INSTRUMENT.

Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill be found. And the drawer, upon request as aforesaid, must give such duplicate (s. 69, reproducing 9 & 10 Will. iv. c. 17, s. 3). And in any proceedings on a bill the Court or judge may order that its loss shall not be set up, provided an indemnity be given to the satisfaction of the Court or judge (s. 70, reproducing Com. Law Proc. Act, 1854, s. 87).

#### X. BILLS IN A SET.

Where a bill is drawn in a set (*i.e.* two or more copies are signed and issued by the drawer), each part being numbered, and containing a reference to the other parts, the whole constitutes one bill (s. 71 (1)), and where any one part is discharged the whole bill is discharged (s. 71 (6)), subject to the exceptions stated in the next paragraph. The acceptance may be written on any, but only on one part (s. 71 (4)).

If the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every subsequent indorser is liable on the part he has indorsed (s. 71 (2)). Where two or more parts are negotiated to different holders in due course, as between them, the holder whose title first accrues is the true owner of the bill, but this rule does not affect the rights of a person who in due course accepts or pays the part first presented to him (s. 71 (3)). If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part. If the acceptor pay the bill without requiring the part bearing his acceptance to be delivered up, and that part at maturity is outstanding in the hands of a holder in due course, the acceptor is liable to the holder thereof (s. 71).

#### XI. CONFLICT OF LAWS.

Where a bill is drawn in one country and is negotiated, accepted, or made payable in another, its *validity* as regards form is determined by the law of the place of issue; and as regards the form of a supervening contract (*e.g.* acceptance), by the law of the place where such contract was made. Provided that a bill issued out of the United Kingdom is not invalid by reason that it is not stamped in accordance with the law of the place of issue (see below, XIII.); and, if it conforms, as regards form, to the law of the United Kingdom, it may, for the purpose of enforcing payment, be treated as valid between all persons who negotiate, hold, or become parties to it in the United Kingdom (s. 72 (1)). Subject to the provisions of the Act (*e.g.* that a bill is not an assignment of funds), the *interpretation* of the drawing, indorsement, or acceptance of a bill is determined by the law of the place where such contract was made; but where an inland bill is indorsed in a foreign country, the indorsement is to be as regards the payer (but not other parties, *e.g.* payee, *Alcock v. Smith*

[1891], 1 Ch. 238), interpreted according to the law of the United Kingdom (s. 72 (2)).

The duties of the holder as to presentment, protest, notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured (s. 72 (3)).

*Rate of Exchange.*—If the bill is drawn out of, but payable in the United Kingdom, and the amount is not expressed in English currency, it is, in the absence of express stipulation, calculated according to the rate of exchange for sight drafts at the place of and on the day for payment (s. 72 (4)).

*The due date*, where a bill is drawn in one country, but payable in another, is determined according to the law of the place for payment (s. 72 (5)). Thus a London bill on Paris is not entitled to days of grace (Chalmers, p. 244). See also BUSINESS DAY.

## XII. LIMITED COMPANIES.

A company with limited liability under the Companies Acts must have its name mentioned in legible characters in all bills, notes, indorsements, and cheques purporting to be signed by it, or on its behalf (Companies Act of 1862, s. 41). If any director, manager, or officer of the company, or any person on its behalf, signs or authorises to be signed, any bill, note, indorsement, or cheque whereon its name is not so mentioned (*i.e.* the correct name, *Atkins v. Wardle*, 1889, 58 L. J. Q. B. 377, with the word "limited," *Penrose v. Martyr*, 1858, El. B. & E. 499), he is liable to a penalty of £50, and personally liable to the holder of the bill, etc., for the amount of it, unless it is duly paid by the company (*ibid.* s. 42). A bill is deemed to be made, accepted, or indorsed on behalf of a company if so made, etc., in the name of the company, or by, or on behalf, or on account of the company by any person acting under its authority (*ibid.* s. 47). Thus if the signature is "A. B., C. D., directors of the company" to which the bill is addressed, A. B. and C. D. are not, but the company is, liable on the acceptance (*O'Kell v. Charles*, 1876, 34 L. T. 822). As to what is a sufficient indication that the signatories sign only on behalf of the company, *cp. Dutton v. Marsh*, 1871, L. R. 6 Q. B. 361, and *Alexander v. Sizer*, 1869, L. R. 4 Ex. 102; and see above, II. As to the power of a limited company to contract by bill, see above, II., *Corporation*. Sec. 47, just cited, does not give every company under the Companies Act such power. The power exists where, on a fair construction of the memorandum and articles, it appears that it was intended to be conferred (*Peruvian Railway Co. v. Thames, etc., Insurance Co.*, 1867, L. R. 2 Ch. 617). The authority of a manager to accept, etc., bills on behalf of the company, where it is not expressly conferred, can only be implied from the ordinary course of the company's business, or by being necessary to the exercise of other powers conferred on him (*In re Cunningham & Co. Lim.*, 1887, 36 Ch. D. 532). The liquidator of a company in a winding-up may accept, etc., bills without the sanction of the Court (Act of 1862, ss. 95 and 133; Act of 1890. s. 12).

## XIII. STAMPS.

The references are to the Stamp Act, 1891.

*Rate.*—Bill payable on demand, at sight, or on presentation, one penny. Bill of any other kind, and any note drawn or expressed to be payable, or actually paid, indorsed, or negotiated in the kingdom for less than £5, one penny; over £5, twopence; over £10, threepence; over £25, sixpence; over £50, ninepence; over £75, one shilling; over £100, or every £100 or part of £100, one shilling.\*

Bank of England notes and certain bank drafts, letters of credit, and drafts and bills of the Paymaster-General, etc., or for remitting money on public revenue account, and interest coupons or warrants attached to a security for money, are exempt from stamp duty.

The fixed duty of one penny on bills payable on demand, or at sight, or on presentation may be denoted by an adhesive stamp. All other inland bills, and all inland notes, must be drawn on paper bearing impressed stamps (s. 2). The *ad valorem* duties on bills and notes, drawn or made out of the kingdom (or purporting to be so drawn or made (s. 36)), must be denoted by an adhesive stamp (s. 34). The person to whose hands a bill or note, drawn or made out of the kingdom, comes before it is stamped must affix, and cancel, a proper adhesive stamp to it (s. 35).

*Offences as to Bills*—The Bills of Exchange Act, 1882, is silent as to criminal offences with regard to bills, notes, or cheques; as documents originating in the law merchant, and not being part of the legal currency of the realm, they were not regarded at common law as money (*R. v. Keena*, 1867, L. R. 1 C. C. R. 113), nor as goods or chattels, but as choses in action (*q.v.*), and could not be stolen (*Caley's case*, 1584, 8 Co. Rep. 33). But as mere pieces of paper they would be apparently the subject of petty larceny or simple larceny (*R. v. Perry*, 1845, 1 Den. C. C. 69; *R. v. Watts*, 1853, 23 L. J. M. C. 56). They are included within the definition of "property" and "valuable security" in sec. 1 of the Larceny Act, 1861, 24 & 25 Vict. c. 96; and the theft or embezzlement of bills, notes, and cheques or their proceeds is punishable under that Act, and the Larceny by Partner Act, 1868, 31 & 32 Vict. c. 116, to the same intent and under the same enactments as theft or embezzlement of chattels or money (see EMBEZZLEMENT; FALSE PRETENCES; LARCENY; MENACES; RECEIVING). Stealing bills, etc., in transit through the post is also a felony punishable under sec. 26 of the Post Office Offences Act, 1837, 7 Will. iv. & 1 Vict. c. 36.

A few points only require special consideration with reference to criminal dealings with bills of exchange. Where a bill, note, or cheque intrusted to *any* person for safe custody only, even if it be to a partner or joint owner, is misappropriated, the offender can be convicted of larceny, though as bailee joint owner of the bill he originally had lawful possession (24 & 25 Vict. c. 96, s. 3; 31 & 32 Vict. c. 116, s. 1). The question upon which the criminal liability turns is whether the bailment involved the safe return of the bill or of its proceeds *in specie* (*R. v. Oxenham*, 1877, 46 L. J. M. C. 125; *R. v. Weekes*, 1866, 10 Cox C. C. 224; *R. v. Cosser*, 1877, 13 Cox C. C. 187; *In re Bellencontre* [1891], 2 Q. B. 122).

Under sec. 75 of the Larceny Act, 1861, it is a misdemeanour for a banker, merchant, broker, attorney, or other agent intrusted with a bill, note, or cheque for safe custody or a special purpose, without authority to negotiate, transfer, or pledge, so contrary to good faith negotiates, etc., or in any way converts to the use or benefit of himself, or any person other than the trustor, either the security or its proceeds. This provision re-enacts in substance 52 Geo. III. c. 53, s. 1, which seems to have been passed in consequence of the decision in *R. v. Walsh*, 1812, Russ. & R. 215.

Bills, notes, and cheques are also under that part of sec. 75 of the Larceny Act, 1861, which makes it a misdemeanour for bankers, merchants, brokers, attorneys, or other like agents (*R. v. Portugal*, 1886, 16 Q. B. D. 567) intrusted with a "security for money," with a direction in writing, to apply, pay, or deliver it or its proceeds, or any part thereof, for any purpose to any person specified, to convert it to his own use or benefit, in violation of good faith and contrary to the terms of the direction.

The offence is not triable at Quarter Sessions (*q.v.*) (24 & 25 Vict. c. 96, s. 37).

To be within this provision the bill need not be complete. Thus an inchoate acceptance sent to the drawer to fill in his name and discount for the acceptor has been held within the section (*R. v. Bowerman* [1891], 1 Q. B. 112). But the document must be substantially complete (*R. v. Hart*, 1836, 6 Car. & P. 106), or in such a condition that it could, under the Bills of Exchange Act, become a good negotiable security if filled in and completed (see *Schofield v. Earl of Lonsborough* [1896], App. Cas. 512; *Clutton v. Attenborough* [1897], App. Cas. 90).

The bill, etc., must be deposited for a specific purpose indicated in writing—*e.g.* for cover and commission on a transaction on stocks or shares, or to pay for shares to be bought (*R. v. Cronmire*, 1886, 16 Cox C. C. 42; *R. v. Christian*, 1873, L. R. 2 C. C. R. 94).

It is a felony with intent to defraud (1) to forge or alter a bill of exchange or any acceptance of a bill of exchange, or a promissory note for the payment of money, or any indorsement or assignment of such bill or note; and (2) to offer, alter, or dispose of a bill or note, etc., with knowledge of the forgery or alteration. The punishment is penal servitude for life or not less than three years, or imprisonment with or without hard labour for not over two years (24 & 25 Vict. c. 98, s. 22; 54 & 55 Vict. c. 69, s. 1); and the offender may be required to enter into recognisances and find sureties for the peace and good behaviour (24 & 25 Vict. c. 98, s. 51). The offence is not triable at Quarter Sessions (*q.v.*) (5 & 6 Vict. c. 38, s. 51).

For the purposes of this section, the definition of acceptance, bill, indorsement, and note may be taken as the same as in the Bills of Exchange Act, 1882. It is wide enough to include a bank-note, but forgery thereof falls also under 24 & 25 Vict. c. 98, s. 12.

Cheques fall within 24 & 25 Vict. c. 98, s. 22; but are also within sec. 23, which punishes as felony, and with the same penalties, the forgery, etc., of any undertaking, warrant, order, authority, or request for the payment of money or any indorsement or assignment thereof, and sec. 25 as to obliterating, adding to, or altering the crossing of a cheque or draft on any banker in the transverse lines and the words " & Co."

\*The definitions of crossing in secs. 76–78 of the Bank of England Act, 1882, and sec. 25 of the Forgery Act, are not quite the same.

The provisions of sec. 100 of the Larceny Act, 1861, as modified by sec. 24, of the Sale of Goods Act, 1893, do not apply where the offence has been committed with respect to a bill or note which, before the time when the order is made, has been negotiated with or transferred to a *bond fide* holder without notice or reasonable grounds to suspect the commission of the offence.

The forms of indictment for these offences with respect to bills are given in Archbold, 21st ed., *passim*. The description of the documents in indictments is regulated by 14 & 15 Vict. c. 100, ss. 5 and 7, and 24 & 25 Vict. c. 98, ss. 42, 43, which make it unnecessary to set the bill, etc., out in full or *fac simile*, and sufficient to describe it by its usual name or designation. Where a bill, etc., has been criminally obtained under the Larceny Act, 1861, and *cashed*, it may be described in the indictment as money (24 & 25 Vict. c. 96, s. 71; *R. v. Keena*, 1868, L. R. 1 C. C. R. 113). See *R. v. Madox*, 1805, Russ. & R. 92; 1 Hale, P. C. 504; 2 East, P. C. 693.

**Bills of Health.**—A bill of health is a document given to the master by the authorities of the port from which the ship comes, describing

the sanitary conditions there. It may be a clean, suspected, or foul bill. A clean bill is given when no disease of an infectious or contagious kind is known to exist; a suspected bill, when there is reason to fear such disease, though it has not actually appeared; a foul bill, when such a disease has appeared at the time of the vessel's departure (Pollock and Bruce, *Merchant Shipping*, i. p. 143). Every ship is bound to have a bill of health, or she may be quarantined at the port where she arrives; and accordingly a charter-party which provided that "the vessel should be sufficiently furnished with everything necessary and needful for the voyage," was held to be broken by the master's not having procured a bill of health, owing to which the ship was detained (*Levy v. Costerton*, 1816, Holt, 167; 16 R. R. 808). An English form of a bill of health is given in Pollock and Bruce (ii. 453). A bill of health may be incidental evidence of the ownership of a vessel warranted neutral in a policy of insurance, as showing the port from which she came (Arn. 628). See MARINE INSURANCE.

**Bills of Lading.**—A bill of lading is an instrument which has had a recognised existence in commerce and commercial law for certainly two hundred years, and embodies an undertaking by a shipowner to carry the goods specified in it on board his ship from one port to another on payment by the shipper of a specified sum. It differs from a charter-party, which is another contract of sea carriage (see CHARTER-PARTY), in that "it is required and given for a single article (*i.e.* parcel) or more laden on board a ship that has sundry merchandise shipped for sundry accounts, whereas a charter-party is a contract for a whole ship" (Lawes, *Charter-parties and Bills of Lading*, 1813, p. 319). In the leading case of *Lickbarrow v. Mason* (1787, 1 Smith, *L. C.* 674; 1 R. R. 425), Lord Loughborough gives the following definition of it: "A bill of lading is the written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight. The contract in legal language is a contract of bailment. In the usual form of the contract the undertaking is to deliver to the order or assigns of the shipper. By the delivery on board the shipmaster acquires a special property to support that possession which he holds in the right of another, and to enable him to perform his undertaking. The general property remains with the shipper of the goods until he has disposed of it by some act sufficient in law to transfer property. This indorsement of the bill of lading is simply a direction of the delivery of the goods" (p. 691). Buller, J., describes it as "an acknowledgment under the hand of the captain that he has received such goods (loaded on board his ship), which he undertakes to deliver to the person named in that bill of lading" (*Caldwell v. Ball*, 1786, 1 T. R. 216; 1 R. R. 187). "It has also been described as being the written evidence of a contract for the carriage and delivery of goods. The instrument is in effect not only a contract of affreightment, but a contract of bailment [*q.v.*] also" (Lawes, pp. 316, 317).

The following skeleton form is given by Carver (*Carriage by Sea*, s. 54) as common to all bills of lading more or less:—"Shipped in good order and condition by \_\_\_\_\_, in and upon the good ship called the \_\_\_\_\_, whereof is commander for the present voyage \_\_\_\_\_, now riding at anchor in the port of \_\_\_\_\_ and bound for \_\_\_\_\_ (*description of goods*) marked and numbered as in the margin, and are to be delivered in the like good order and condition at \_\_\_\_\_ aforesaid, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and

navigation of whatever nature and kind soever excepted, unto or to his assigns, he or they paying freight for the said goods at the rate of with primage and average accustomed. In witness whereof the master or agent of the said ship hath affirmed to bills of lading, all of this tenor and date, the one of which bills being accomplished the others to stand void. Dated in the day of . Signed .” Abbott (ed. 1827) gives an “old form of bill of lading,” which is in very much the same form, except that the only exception is “the dangers of the seas” (*Shipping*, p. 362). In practice, numerous additional conditions and exceptions are made to the general form given above, and every maritime trade has a bill of lading, or, at any rate, peculiar conditions of its own, *e.g.* the Liverpool Bill of Lading, 1882; the Hamburg Bill of Lading, 1885; the Mediterranean, Black Sea, and Baltic Steamship Bill of Lading, 1885; the New York Produce Exchange Bill of Lading; the P. & O. Steam Navigation Co. Bill of Lading, etc. (collected in Leggett, *Bills of Lading*, App.; and Carver, App. A). The International Law Association (*q.v.*) have also endeavoured to get ship-owners and shippers to adopt a form of bill of lading framed by the Association and suitable for general use, as containing the terms usually employed in this contract, and which would fulfil the duty for bills of lading which the Association’s York-Antwerp Rules have done for general average, but hitherto without success. Bills of lading are generally drawn in a set consisting of several parts (each being a complete bill in itself). In some cases there have been as many as eight parts (Leggett, p. 1), but three is a usual number, as it was in 1787 (*Lickbarrow v. Mason*, ante, Buller, J., p. 684), of which the master retains one, and the others are given to the consignee. Though the practice may be convenient to the shipper, and is universally adopted, it may give occasion for fraud by the different parts being negotiated to different persons. Sometimes one is marked “Original” and the others “Duplicate,” or one is marked “First” and another “Second,” and so on (*Glyn, Mills, & Co. v. East and West India Dock Co.*, 1882, 7 App. Cas. 591); but this does not make one more effectual in itself than another. The effect of the clause given in the form above is that “the shipowner after accomplishing his contract in good faith on one of them, is not to be liable on any of the others” (Lord Cairns, *Glyn’s* case above). Every bill of lading requires a stamp of 6d. under a penalty of £50, and it cannot be stamped after signature (Stamp Act, 1891, ss. 1, 2, 14 (4), 40, schedule). It is usually signed by the master of the ship; but it is the custom in the case of steamships for the ship’s broker, and not the master, to sign it (*Hayn v. Culliford*, 1878, 3 C. P. D. 410). If, however, the master signs it after it has been made out and filled in by the ship’s agent, the former is responsible for the correctness of its terms, including the date (*Stumore v. Breen*, 1886, 12 App. Cas. 698). The words “or assigns” make the instrument negotiable, and it may be transferred by indorsement from its holder to any other person who may thereby (but does not necessarily) acquire the property in the goods to which it relates, and become entitled to all rights and subject to all liabilities in respect of those goods, as if the bill of lading had been originally granted to him, or he had been named as consignee in it (Bills of Lading Act, 1855, ss. 1 and 2).

The foregoing is enough to show that a bill of lading has no fewer than three aspects in law, viz. (a) an acknowledgment of, or receipt for, the goods to which it relates; (b) a contract by the shipowner to carry and deliver those goods; (c) the symbol of property in the goods.

(a) *Bill of Lading as a Receipt*.—By its opening clause a bill of lading is



primarily a receipt for the goods which have been placed in the charge of the shipowner. The receipt, however, that is primarily given for the goods is the mate's receipt, which may show the terms on which the goods are received, or refer to some particular form of bill of lading which is to follow it (*De Clermont v. General Steam Navigation Co.*, 1891, 7 T. L. R. 187). A "clean" mate's receipt is one in which the acknowledgment of the receipt of goods is not qualified by any reservation as to their quantity or quality (*Armstrong v. Allan*, 1892, 8 T. L. R. 613); but the statement of quantity in it is not conclusive against the shipowner (*Biddulph v. Bingham*, 1874, 30 L. T. 30). In most cases this receipt is exchanged for a bill of lading (Carver, 50), except where the voyage is a coasting one, in which case a bill of lading is not necessary to pass the property in the goods (*Evans v. Nicholl*, 1841, 11 L. J. C. P. 6, Maule J.). A shipper is entitled to have a bill of lading duly signed by the shipowner; and a refusal by him to do so, or return the goods, will make him liable to the shipper either for a conversion of the goods, or damages for breach of contract, according as the master's action amounts to setting up the title of another person to the goods or not (*Falke v. Fletcher*, 1865, 34 L. J. C. P. 146; *Jones v. Hough*, 1879, 5 Ex. D. 115). The shipowner is bound to give the bill of lading to the right person, *i.e.* the person entitled to the goods; this is generally the shipper, if the shipowner has no notice to the contrary (*Hathesing v. Laing*, 1873, L. R. 17 Eq. 92); and in the older cases the view was expressed that the master was bound to give the bill of lading only in exchange for the mate's receipt (*Craven v. Ryder*, 1816, 6 Taun. 433; 16 R. R. 644; *Ruck v. Hatfield*, 1822, 5 Barn. & Ald. 632; 24 R. R. 507). If, however, the mate's receipt is in the hands of a purchaser, or of the owner of the goods on whose account they were shipped by an agent, it may be difficult for the master to know who is entitled to the bill of lading for the goods. The later decisions modify the older view given above, and lay down the rule that the shipowner will be justified if he gives a bill of lading (and consequently delivery of the goods) to the person really entitled to the goods, irrespective of who is in actual possession of the mate's receipt (*Cowasjee v. Thomson*, 1845, 5 Moo. P. C. 165, where the holder of the mate's receipt was not the owner of the goods; *Schruster v. McKellar*, 1857, 26 L. J. Q. B. 281, where the owners had the mate's receipt, but the bill of lading was wrongly given to an intending purchaser of the goods, who had been allowed to ship them on condition of his giving them the mate's receipt, which he got for the goods from the master; *Hathesing v. Laing*, *ante*, where an agent was the owner of the goods, but had shipped them in the name of his principals, and taken the receipt in their names, and the master was held justified in making delivery to the principals, not having any notice of any other claim). In prudence, therefore, the shipowner should always require that the mate's receipt should be given up in exchange for the bill of lading (*Thompson v. Trail*, 1826, 2 Car. & P. 339; Carver, 60). Though a bill of lading is a receipt for the goods as between the shipowner and the shipper, its statements as to the quantity and quality of the goods are not, at common law, conclusive against the shipowner or his master, though he has signed the bill of lading. Thus they are not conclusive evidence of the quantity shipped as between the shipper and shipowner (*Bates v. Todd*, 1831, 1 Macl. & R. 106; *Berkeley v. Watling*, 1837, 7 Ad. & E. 29); or as between the shipowner and an indorsee of the bill of lading for value (*Grant v. Norway*, 1851, 20 L. J. C. P. 93; *Jessel v. Bath*, 1867, L. R. 7 Ex. 267). The Bills of Lading Act, 1855, however, provides that "every bill of lading in the hands of a consignee or indorsee for value, representing goods

to have been shipped on board a vessel, shall be conclusive evidence as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not, in fact, been laden on board; provided that the master or other person so signing may exonerate himself in respect of such misrepresentations, by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder or some person under whom the holder claims (s. 3). It has been held that this statute does not make the bill of lading conclusive evidence against anyone but a person actually signing it, or in whose name and with whose authority it is signed, e.g. a shipowner is not bound by his master's signature under a contract by charter-party for "the master to sign bills of lading for weight of cargo as presented to him by the charterers" (*Brown v. Powell Coal Co.*, 1875, L. R. 10 C. P. 562); nor where the bill of lading was signed "by authority of the captain, A. B. agent" (*Thorman v. Burt*, 1886, 54 L. T. 349). A statement of weight is thus not conclusive against the shipowner (*Blanchet v. Powells*, 1874, L. R. 9 Ex. 74; *The Emilien Marie*, 1875, 32 L. T. 435). Similarly, a description in the bill of lading of the quality of the goods shipped, signed by the master, is not conclusive against the shipowner where the bill of lading provided that, "if quality marks are inserted in the shipping notes, and the goods are accepted by the mate, bills of lading in conformity therewith shall be signed by the captain, and the ship shall be responsible for the correct delivery of the goods," and the marks in the bills of lading corresponded with those in the shipping notes, but on discharge the marks on the cargo did not correspond with those in the documents (*Cox v. Bruce*, 1886, 18 Q. B. D. 147); and Lord Esher stated it as the rule that "the nature and limitations of the captain's authority are well known among mercantile persons, and, apart from the special terms of the contract between the shipper and shipowner, he is only authorised to perform all things usual in the line of business in which he is employed." A master who has signed one set of bills of lading cannot charge his owners by signing other bills of lading for goods which are not on board, for his power is then exhausted (*Hubbersty v. Ward*, 1853, 22 L. J. Ex. 113). On the other hand, a statement in a bill of lading, signed by a master, is conclusive in an action against him (*Smith v. Tregarthen*, 1887, 56 L. J. Q. B. 437), or in an action by him (*Meyer v. Dresser*, 1864, 16 C. B. N. S. 646). It may also be provided by the contract that the bill of lading shall be conclusive evidence, against the owners, of the quantity of cargo received as stated therein. In such a case, though it was known to the captain that part of the cargo was lost before being put on board, after it had been brought alongside and a mate's receipt given for it, and he objected to signing clean bills of lading for the full quantity mentioned in the mate's receipt, but did so on being told by the shippers' agent and a clerk of the shipbrokers that he was bound to do so, the shipowner was estopped from denying that the full amount of cargo stated in the bills of lading was shipped (*Lishman v. Christie*, 1887, 19 Q. B. D. 333, overruling, if contrary to it, the decision in *Pyman v. Burt*, 1884, 1 C. & E. 207). And so where, by the contract, the bill of lading is conclusive evidence against cargo-owners of the quantity of cargo shipped, and some cargo was lost before shipment, the shipowners were held liable for short delivery of the cargo that the master gave bills of lading for (*Fisher v. Calder*, 1896, 1 Com. Cas. 450).

Although the quantity stated in the bill of lading is not conclusive against the shipowner, still it is *prima facie* evidence that such an amount

has been shipped, and the burden of proving that it was not lies on the shipowner (*McLean v. Fleming*, 1871, L. R. 2 H. L. Sc. 130, Lord Chelmsford; *Smith v. Bedouin S. N. C.* [1896], App. Cas. 70; *Bennett v. Bacon*, 1897, 13 T. L. R. 204). But fraud of the shipper destroys the conclusiveness of the bill of lading (*Valieri v. Boyland*, 1866, L. R. 1 C. P. 382). The shipowner may introduce qualifications into his account of the quantity and quality of the goods. Thus the words "weight, value, and contents unknown," printed in a bill of lading, were held to protect the person who signed it (the captain) from liability for inserting in writing a description of the weight of the goods shipped (*Jessel v. Bath*, ante, p. 112), though in an earlier case similar words, viz. "contents unknown, and not responsible for weight," were held not to protect the master, who signed for a certain weight as shipped (*Bradley v. Dunipace*, 1862, 32 L. J. Ex. 22). The shipper may avail himself of this clause no less than the shipowner; and an innocently false description of an article shipped as *linen*, which paid a lower freight, instead of *silk*, as it really was, was held not to prevent the shipper from recovering the value as *silk*, the captain having stamped on the bill of lading the words "weight, value, and contents unknown" (*Lebeau v. General Steam Navigation Co.*, 1872, L. R. 8 C. P. 88).

The same effect belongs to general statements in the bills of lading, such as "shipped in good order and condition," which, if standing alone, with nothing to qualify it, makes the instrument a "clean" bill of lading (*Restitution S. S. Co. v. Pirie*, 1889, 61 L. T. 533, Cave, J., adopting the definition given in Pollock and Bruce, *Merchant Shipping*; and in *Arrospe v. Barr*, 1881, 8 Sess. Ca. (4th) 602, the Scotch judges seem to have put a similar interpretation on the phrase). The words, however, only amount to an admission by the shipowner that the goods are so, so far as he and his agents can judge (*The Freedom*, 1871, L. R. 3 P. C. 594); and where they occur together with the clause "quality and quantity unknown," the latter prevents their taking effect (*The Ida*, 1875, 32 L. T. 541, cargo heating on the voyage), except as to the external appearance of the goods (*The Peter der Grosse*, 1875, 1 P. D. 414, Sir Robert Phillimore, upheld by the Court of Appeal, 3 Asp. 195).

In another way, a bill of lading may be nothing more than a receipt, and that is where the goods are shipped by the charterer of a ship, "the bill of lading being merely in the nature of a receipt between the shipowner and the charterer, because all the other terms of the contract between them are contained in the charter-party, and the bill of lading is merely given as between them, to enable the charterer to deal with the goods in transit" (Lord Esher, *Leduc v. Ward*, 1888, 20 Q. B. D. 479); but this question is better dealt with under the following head.

(b) *Bill of Lading as a Contract*.—It has been a disputed point whether the bill of lading is a conclusive statement (i.e. contains all the terms) of the contract of carriage, or whether it is only evidence (however good) of it. On the one hand, it has been said that "it is not the contract, but only the evidence of the contract" (Lush, J., *Crooks v. Allan*, 1879, 5 Q. B. D. 40). "There is another inaccuracy in the statute (the Bills of Lading Act), which indeed is universal. It speaks of the contract contained in the bill of lading. There is no contract in it. It is a receipt for the goods, stating the terms on which they were delivered to and received by the ship, and therefore excellent evidence of those terms; but it is not a contract" (Lord Bramwell, *Sewell v. Burdick*, 1884, 10 App. Cas. 105). And there is also the fact that the bill of lading is not usually signed till after the goods are shipped, and it may contain terms not agreed upon at the time of shipping,

or omit terms then understood (Carver, 56). On the other hand, the Bills of Lading Act, 1855, speaks of "the contract contained in the bill of lading," and the highest judicial opinions favour this view. "The bill of lading must be taken to be the contract under which the goods are shipped" (Blackburn, J., *Fraser v. Telegraph C. C.*, 1872, L. R. 7 Q. B. 571). "The primary office and purpose of a bill of lading, although by mercantile law and usage it is a symbol of the right of property in the goods, is to express the terms of the contract between the shipper and shipowner" (Lord Selborne, *Glyn, Mills, & Co. v. East and West India Dock Co.*, 1882, 7 App. Cas. 596). "The terms of the Bills of Lading Act show that the Legislature looked upon a bill of lading as containing the terms of the contract of carriage" (Lord Esher, *Leduc v. Ward*, *ubi sup.* p. 480). "Here (in the Act) is a plain declaration of the Legislature that there is a contract contained in the bill of lading. . . . It seems to me impossible, therefore, now to contend that there is no contract contained in the bill of lading, whatever might have been the case before the statute" (Fry, L. J., *ibid.* p. 483). The importance of this latter view is that the terms of the bill of lading cannot be added to or altered by evidence of any other arrangement between the parties; and thus in *Leduc v. Ward* a bill of lading, which stated that the goods were shipped for delivery on board a vessel lying at Fiume and bound for Dunkirk, with liberty to call at any ports in any order, could not be varied by allowing evidence to be given that the shippers of the goods, at the time that the bill of lading was given, knew that the vessel was intended to proceed *via* Glasgow, which was quite outside the course of the voyage to Dunkirk.

But it is not always the case that the bill of lading contains the contract; and it may on its face be incomplete, *e.g.* if it contains a clause, "freight for the said goods being paid," without saying the amount of freight, when evidence is allowed to show the amount agreed upon (*Andrew v. Moorhouse*, 1814, 5 Taun. 435; 15 R. R. 544; *Lidgett v. Perrin*, 1861, 11 C. B. N. S. 362); or it may incorporate by reference the provisions of a particular form of bill of lading, *e.g.* New Zealand bill of lading (*The Canada*, 1897, 13 T. L. R. 238); or those of a foreign statute, *e.g.* the Haster Act (U.S.) (*Dobell v. S. S. Rossmore Co.* [1895], 2 Q. B. 408; *The Glenochil* [1896], Prob. 10). The bill of lading must contain the terms agreed upon, expressly or impliedly, when the goods are shipped; and the shipowner is liable to the shipper for damages if he refuses to give such a bill of lading (*Peck v. Larsen*, 1871, L. R. 12 Eq. 78; *Jones v. Hough*, 1879, 5 Ex. D. 115). While, on the other hand, a shipper, after shipping goods in a general ship, may not reclaim them without paying freight and indemnifying the master against the consequences of any bill of lading which he has signed (*Tindall v. Taylor*, 1854, 4 El. & Bl. 219); *a fortiori* where the goods are lost after shipment, but before bills of lading have been given for them, under a charter-party which provided that bills of lading were to be presented in twenty-four hours after shipment, and charterers refused to present bills of lading, it was held they were bound to do so, and the shipowners recovered the advance freight (*Oriental S. S. Co. v. Tylor* [1893], 2 Q. B. 518). Where a penalty is provided by a charter-party in case of a refusal by the master to sign bills of lading as presented, even though it be specified to be damages, or liquidated damages, it will be held to be only a penalty, and not damages (*Jones v. Hough*, *ante*; *The Princess*, 1894, 70 L. T. 388; *Rayner v. Rederiaktiabolaget Condor*, 1895, 73 L. T. 96). The terms of a bill of lading relate to what has been done before shipment as well as after it; and thus its exceptions take effect from the time when the goods are put in the ship-

owner's charge (*The Duero*, 1869, L. R. 2 Ad. & Ec. 393; *Pyman v. Burt*, ante, p. 113, where part of a cargo of timber, while lying alongside the ship and for which a mate's receipt had been given, was lost, and the shipowner was held to be protected by his bill of lading). If no bill of lading be given for the shipment of goods, the contract under which they are to be carried is to be gathered from the charter-party (if any, and the charterer ships the goods); or from the mate's receipt, if there is one; or from shipping cards, placards, or handbills announcing the sailing of the ship (*Phillips v. Edwards*, 1858, 28 L. J. Ex. 52; *Peel v. Price*, 1815, 4 Camp. 243; 16 R. R. 785); or from representations by the broker or other agent of the carrier (*Runquist v. Ditchell*, 1800, 3 Esp. 64, where a bill of lading was given, but its terms were not regarded). The proper party to sue upon the contract, if it is embodied in a bill of lading, is the shipper who has made it with the shipowner, even though the goods really belong to a third party (*Dunlop v. Lambert*, 1839, 6 Cl. & Fin. 600); and this would be so even though the freight is payable by that third party. If no bill of lading is entered into, then the person to whom the goods belonged at the time of shipment or who is to bear the risk of transit, is the proper party to sue on it, i.e. the consignee (*Fragano v. Long*, 1825, 4 Barn. & Cress. 219); and so he may where a bill of lading is given (*Tronson v. Dent*, 1853, 8 Moo. P. C. 49. See Carver, 61; Pollock and Bruce, 360).

Where the goods for which a bill of lading has been given are shipped in a chartered ship, it depends upon who the shipper is whether the bill of lading amounts to a contract or not, i.e. whether he is the charterer or a third party; for even where the former is the shipper, the usual practice is for the master to give him bills of lading for the cargo. As regards him, it has already been indicated that the bill of lading is a receipt only. "Where there is a charter-party, as between charterers and shipowners, the bill of lading operates *prima facie* as a mere receipt for goods, and a document of title which may be negotiated, and by which the property is transferred, but does not operate as a new contract, or alter the contract contained in the charter-party" (Lopes, L. J., *Rodocanachi v. Milburn*, 1886, 18 Q. B. D. 67). "The proper construction of the two documents, taken together, is that, as between the shipowner and the charterer, the bill of lading, though inconsistent with certain parts of the charter, is to be taken only as an acknowledgment of the receipt of the goods. With regard to the effect of these documents as between charterers and shipowners, I adopt fully what was said by Lord Bramwell in *Sewell v. Burdick*" (Lord Esher, M. R., *ibid*). This rule is exemplified in numerous cases (*Gledstanes v. Allen*, 1852, 12 C. B. 202; *The San Roman*, 1872, L. R. 3 Ad. & Ec. 583; *Wagstaff v. Anderson*, 1880, L. R. 5 C. P. 177, Bramwell, L. J.; *Capper v. Wallace*, 1880, 5 Q. B. D. 166, Lush, L. J.), the only exception being that if the charterer has negotiated the bills of lading, the ship's destination cannot be altered from that given in them (*Davidson v. Gwynne*, 1810, 12 East, 381; 11 R. R. 420). The parties may, however, agree to vary the terms of the charter-party by those of the bill of lading (*Davidson v. Bisset*, 1878, 5 Sess. Ca. (4th) 709, where it was said that "the charter-party may be varied by the bill of lading in matters which relate to details of the mode in which the contract of carriage is to be performed" (so *Bryden v. Niebuhr*, 1884, 1 C. & E. 241; *Rodocanachi v. Milburn*, ante). If the charterer transfers the bills to third parties, they may become contracts between their holders and the shipowners, independent of the charter-party, unless that is incorporated in it by express terms, even though their holders have notice from the bills of lading of the existence of the charter-party (*Foster v. Colby*, 1858, 28 L. J. Ex. 81; *Shand v. Sanderson*,

1859, 28 L. J. Ex. 278; *Chappell v. Comfort*, 1861, 31 L. J. C. P. 58; *Fry v. Chartered Mercantile Bank*, 1866, L. R. 1 C. P. 689). To quote Lord Esher again: "Where there is a charter-party, as between the shipowner and the charterer, the bill of lading may be merely in the nature of a receipt for the goods, because all the other terms of the contract between them are contained in the charter-party; and the bill of lading is merely given as between them, to enable the charterer to deal with the goods while in the course of transit; but where the bill of lading is indorsed over, as between the shipowner and the indorsee, the bill of lading must be taken to contain the contract, because the former has given it for the purpose of enabling the charterer to pass it on as the contract of carriage in respect of the goods" (*Leduc v. Ward*, 1888, 20 Q. B. D. p. 479). If the master improperly issued bills of lading to the charterer without the shipowner's authority, that will not enable the charterer to get better terms for his goods than under his charter-party (*Faith v. East India Company*, 1821, 4 Barn. & Ald. 630; 23 R. R. 423; *Pearson v. Goschen*, 1864, 33 L. J. C. P. 265); but perhaps, in the hands of an innocent holder for value, they would be binding on the shipowner (Carver, 152, quoting *The Emilien Marie*, ante, p. 113), unless they were such as to put anyone taking them on inquiry (*Small v. Moates*, 1833, 9 Bing. 574, where the holder was held to stand in the shoes of the charterer), or unless fraud is proved (*Mitchell v. Seafife*, 1815, 4 Camp. 298; 16 R. R. 795); and even though bills of lading are fraudulently given by a captain for goods never shipped, yet if they get into the hands of innocent persons, who sue the ship in a foreign Court, get her sold, and themselves paid out of her proceeds by the order of that Court, that judgment being *in rem* will not be disturbed by an English Court (*Minna Craig S. S. Co. v. Chartered Bank of India*, 1897, 13 T. L. R. 241). If the shipper be not the charterer, but a third party who ships in the chartered ship, which has been put up as a general ship, the bill of lading is the binding contract as between him and the person, whether shipowner or charterer, who engages to carry his goods. Who is the actual carrier of his goods depends on whether the charter-party amounts to a demise of the ship or not, and, as bills of lading are generally signed by the master, whether the master in signing them is acting on behalf of the owners or charterers. There is no doubt that if the charterer is the temporary owner of the ship, the master is his agent, and the owners are not liable to the shipper on the bill of lading, whether the shipper has notice of the terms of the charter-party or not (*Newberry v. Colvin*, 1820, 7 Bing. 190; *Baumwoll v. Furness* [1893], App. Cas. 8). But if the charterer has only the right to the *use*, as distinguished from the *control and possession*, of the ship, the master remains the servant of the shipowners, and they will be liable to the shippers who hold bills of lading given by the master, and taken in ignorance of the existence of any charter-party (*Sandeman v. Scurr*, 1866, L. R. 2 Q. B. 86; *The St. Cloud*, 1863, 8 L. T. N. S. 54; *The Figlia Maggiore*, 1868, L. R. 2 Ad. & Ec. 105; and *The Patria*, 1871, L. R. 2 Ad. & Ec. 436; *Hayn v. Calliford*, 1878, 3 C. P. D. 410; and 1879, 4 C. P. D. 182, where the charterers, and not the master, signed the bill of lading, "as agents"; *The Stornoway*, 1882, 4 Asp. 529; *The Joseph*, 1888, 4 T. L. R. 693).

In this second case it has been said that the master, in giving bills of lading for goods shipped in any chartered ship, does so as agent for the charterers; and in *Marquand v. Banner* (1856, 25 L. J. Q. B. 313), apparently on the ground that the charterers were the owners of the ship (though the charter-party did not demise the ship, but only provided in the most unlimited terms that the master should, at the charterers' request, sign bills of

lading in the usual manner, and in any manner the charterers might desire), it was held that they, and not the shipowners, were entitled to freight upon bills of lading signed by the master. This decision has been followed in the recent case of *Janentzky v. Langridge* (1895, 1 Com. Cas. 90, Mathew, J.). Similarly, in *Schuster v. McKellar* (1857, 26 L. J. Q. B. 288) Lord Campbell said: "It seems now settled by a numerous class of cases . . . that where there is a hiring of the ship . . . with the intention that the charterer shall employ the ship as a general ship for his own profit, when the master signs bills of lading he does so as agent of the charterer and not of the shipowner." In charter-parties it is commonly stipulated that "the master is to sign bills of lading as required by the charterers"; and in *Wagstaff v. Anderson* (1880, 5 C. P. D. 177), Bramwell, L. J., said that he did not think that, because a bill of lading is signed by the captain as agent for the ship, a contract is made between the shipowner and freighter, the freighter having previously arranged with the charterer that the charterer shall carry his goods. "I think that the remedy of the freighter would be against the charterer with whom he made the contract of affreightment, and that he would not get an additional remedy because he had taken a bill of lading from the shipowner." But the learned judge added that the shipowners could have sued for freight in case the shippers had refused to take delivery of the goods and pay it. Where the bill of lading refers to the charter-party, shipowners can enforce claims for demurrage (*Porteus v. Watney*, 1878, 3 Q. B. D. 534) and freight (*Neill v. Ridley*, 1854, 9 Ex. Rep. 677) against the shippers; they can refuse delivery to the charterer except on production of the bills of lading (*Erichsen v. Barkworth*, 1858, 28 L. J. Ex. 95); and the clause, "master to sign bills of lading as required by charterer," has been explained to mean that "he signs not exactly as agent of the charterer, but because he is bound to sign by reason of the charter-party" (Lush, J., *Smidt v. Tiden*, 1874, L. R. 9 Q. B. 447). Carver is accordingly of opinion that the master really contracts, as regards bills of lading, as the agent of the shipowner, and that thus the bill of lading is a contract between the shipowner and shipper, whether the latter has notice of the charter-party or not. But there are decisions against this view of the master being for all purposes the agent of the shipowner in making the contract, *e.g.* where the shipper knowing that the ship was chartered, it was held the consignee could not sue the shipowner for bad stowage of the goods (*Major v. White*, 1835, 7 Car. & P. 41; *Sandeman v. Scurr*, *ante*, p. 117; Carver, 156 and 157). The charterer can contract with the shippers quite independently of the master, by giving bills of lading to them on his own account (*Herman v. Roy*, *Ex. S. C.*, 1884, 1 C. & E. 413); and, in respect of the same shipment, there may be two contracts with the shipper—one with the shipowner and the other with the charterer (*Wagstaff's case*, *ante*, p. 116; Carver, 158).

As regards the liability of the shipper or his indorsee to the shipowner, "as a general principle it may be laid down that when bills of lading are in the hands of strangers to the charter-party, either as original shippers, or as indorsees to whom the property has passed, they show the contract under which the goods are being carried, and the shipowner's claims, exemptions, and liens, given by the charter-party, are not preserved as against such shippers or indorsees, except so far as those terms of the charter-party are expressly incorporated into the bills of lading" (Lopes, L. J., *Serraino v. Campbell* [1891], 1 Q. B. 292, where all the cases are collected and reviewed by the Court of Appeal). Thus where the charter-party provided that "ship was to have lien on cargo for freight, £3, 10s. per ton . . . to be paid on unloading and right delivery of cargo," and charterers shipped part of the

cargo under a bill of lading, "freight for said goods payable in Liverpool as per charter-party," it was held that in the hands of their indorsees the shipowner had only a lien due for the freight of the goods included in the bill of lading, and not a lien for the whole chartered freight (*Fry v. Chartered Mercantile Bank of India*, 1866, L. R. 1 C. P. 689).

A common form of reference in bills of lading to the charter-party under which the ship is sailing, is the words, "all other conditions as per charter-party." It has been judicially stated, and generally recognised, that those words mean "all these conditions of the charter-party which are to be performed by the consignee of the goods" (Lord Esher, *Serraino v. Campbell*, *supra*). "The immediate context of the words in the bill of lading to be construed is of great importance, and where the words are placed in a clause which begins 'the consignees paying freight and all other conditions, etc.,' the bill of lading must be read to refer to conditions to be observed by the consignee" (Kay, L. J., *ibid.* p. 298; and these definitions only reaffirm an older one of the words as "being limited to conditions *ejusdem generis* with that previously mentioned, viz. payment of freight—conditions to be performed by the receiver of the goods" (Willes, J., *Russell v. Niemann*, 1864, 17 C. B. N. S. 163). On this principle it has been held that these words do not incorporate into the bill of lading a cessor clause in the charter-party (*Gullischen v. Stewart*, 1884, 13 Q. B. D. 317), or an arbitration clause in it (*Hamilton v. Mackie*, 1889, 5 T. L. R. 677), or the charter-party rate of freight where the bill of lading said that "all extra expenses in discharging should be borne by receivers, and other conditions as per charter-party" (*Gardner v. Trechmann*, 1884, 15 Q. B. D. 154); while they have been held to preserve liens for dead freight or demurrage (*q.v.*) at the port of loading (*Gray v. Carr*, 1871, L. R. 6 Q. B. 522) and at the port of discharge (*Porteus v. Watney*, *ante*, p. 118).

As regards the shipowner's liability to shippers on bills of lading signed by the master of a chartered ship, the general rule is, as stated above, that if such bills are within the apparent authority of the master, and the shipper has not taken and is not bound to take, notice of the terms of the charter-party or the extent of the master's authority, they will bind the shipowner, even though they exceed the scope of the master's authority (*Sandeman v. Scurr*, *ante*, p. 117). And if the bill of lading be indorsed by the shipper to another person, even though it contain the words "and all other conditions as per charter-party," and by the charter-party the master was to sign bills of lading as agent of charterers, and charterers were to indemnify shipowners from all liabilities arising therefrom, yet, if the holder has no notice of the terms of the charter-party, he may sue the shipowners for a wrongful delivery of the goods by the master (*Manchester Trust v. Furness* [1895], 2 Q. B. 539). A general provision in such cases is that "the master is to sign bills of lading as required by the charterers, without prejudice to the charter-party." These words have been interpreted as not so much limiting the master's authority as preserving intact, between the shipowner and charterer, the terms of the charter-party (*Gledstanes v. Allen*, *ante*, p. 116; *Shand v. Sanderson*, *ante*, p. 116); and in one case they have been held to entitle the charterer to vary the rate of freight, while justifying the master in inserting in the bills of lading "other conditions as per charter-party," in order to preserve his owner's lien for dead freight and demurrage (*Arrospe v. Barr*, 1881, 8 Sess. Ca. (4th) 602). "The meaning of 'without prejudice to the charter-party' is that, notwithstanding any engagement made by the bills of lading, that contract shall remain unaltered" (Lord Esher, *Hansen v. Harrold* [1894], 1 Q. B. 619. "*Arrospe v. Barr* is not an authority for more



than this, viz. that, except so far as the rate of freight is concerned, the master ought not to sign any bill of lading which is at variance with the charter-party" (Davey, L. J., *ibid.*). The words "bills of lading to be signed at any rate of freight, without prejudice to charter," have been held to give the master no power to sign bills of lading making the freight payable to any other person than his owner (*Reynolds v. Jex*, 1865, 34 L. J. Q. B. 251); and under a charter-party containing a clause, "captain to sign bills of lading at current or any rate of freight without prejudice to this charter-party. . . . and should freight list, according to bills of lading, show a less sum in aggregate than chartered freight, the difference to be paid in cash prior to ship's clearance at Custom House," it has been held that the master is not justified in giving bills of lading making the freight payable "at port of discharge or delivery"; and that the shipowners have a lien on the goods so shipped for freight (*The Canada*, *ante*, p. 115, Jeune, P.). But, as between shipowner and charterer, these words do not allow the bills of lading to contain an exception in favour of the shipowner which is not in the charter-party (*Rodocanachi v. Milburn*, 1886, 18 Q. B. D. 67, Lindley, L. J.). Where, by the charter-party, the master is "to sign bills of lading as presented," indorsees for value have been held to be entitled to goods under bills of lading signed by the master, and making the goods deliverable to the order of the shipper, although by agreement between him and the charterer the goods were to be shipped on charterer's account, who had paid for them (*Gabarron v. Kreeft*, 1875, L. R. 10 Ex. 274, Kelly, C. B., saying, "the words appear to me not only to convey an authority to the master, but to impose an obligation upon him to grant or sign bills of lading in whatever form and to whatsoever effect he might be required by the shipper" (see *Jones v. Hough*, *ante*, p. 115, Bramwell, L. J.)). But such a power will not enable the master to bind his owners by statements of quantity or quality in the bill of lading not within his ordinary authority (*Brown v. Powells Coal Co.*, *ante*, p. 113).

The various obligations resting on shipowners and shippers, whether implied by common law or directly imposed by statute, under bills of lading as contracts of affreightment, and their construction, have been already discussed under AFFREIGHTMENT; as also has the question of the law which governs them, which was shown to be the law of the flag or of the place of contract, so far as the meaning of the contract is concerned (*Blanchet v. Powells*, *ante*), while the effect of the instrument as evidence of the contract is governed by the *lex fori*, or law of the tribunal (*Denholm v. Halmoe*, 1887, 15 Sess. Ca. (4th) 152).

There is no space in this article to treat of the numerous conditions and exemptions added to the bill of lading by the contract between the parties. They are exhaustively summarised by Scrutton (*Charter-Parties*, pp. 169, 170) and Leggett (*Charter-Parties*, *passim*). The chief ones will be found dealt with singly in this work. See RULERS PRINCES and PEOPLES; FIRE; PERILS OF THE SEAS; COLLISION; LEAKAGE AND BREAKAGE; BARRATRY; etc.

The meaning of a "clean" bill of lading has already been given above. A "through" bill of lading is one given for goods which have to make a transit, broken into several parts, *e.g.* partly by land and partly by sea, and, may be by different railways or more than one vessel (*Greeves v. West India Co.*, 1870, 22 L. T. 615). In this case the person, with whom the contract is made is responsible for its proper performance throughout, unless by the contract his responsibility ceases when the goods leave his hands; and generally the carrier in whose hands they are at the time of loss or damage

is liable, if, the through contract was made for his benefit and with his authority, and can avail himself of any exceptions to liability of the carrier in the contract (Carver, 107). It is doubtful whether such bills of lading are within the Bills of Lading Act, 1855 (Carver, 107 n). The rights and liabilities arising out of the assignment of the contract contained in the bill of lading are strictly dependent on the right of property in the goods being vested in the holder of the bill of lading, and are better considered under the next head of the subject. For the other liabilities arising upon the contract, such as freight, demurrage, etc., see FREIGHT; DEMURRAGE.

(c) *Bill of Lading as Symbol of Property*.—In the second trial of *Lickbarrow v. Mason* (1794, 5 T. R. 685; 1 R. R. 425), the jury found a special verdict with regard to the attributes and characteristics of bills of lading by the law merchant. "By the custom of merchants, bills of lading for the delivery of goods to the order of the shipper, or his assigns, are after the shipment, and before the voyage performed, negotiable and transferable by the shipper's indorsement and delivery, on transmitting of the same to any other person, and that by such indorsement and delivery or transmission the property in such goods is transferred to such other person. And that by custom of merchants indorsements of bills of lading in blank may be filled up by the person to whom they are delivered or transmitted with words ordering the delivery to such person; and according to the practice of merchants, the same, when filled up, have the same operation and effect as if it had been done by the shipper." In the above the words "the property in the goods" mean that "the property which it might be the intent of the transaction to transfer, whether special or general, passes by such an indorsement according to the custom of merchants" (Lord Selborne, *Sewell v. Burdick*, 1884, 10 App. Cas. 79).

This office of the bill of lading is, perhaps, most comprehensively stated in the words of Bowen, L. J.: "The law as to the indorsement of bills of lading is as clear as in my opinion the practice of all European merchants is thoroughly understood. A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading wherever it is the intention of the parties that the property shall pass, just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods, and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to someone rightfully claiming under it, remains in force as a symbol, and carries with it, not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which, in the hands of a rightful owner, is intended to unlock the door of the warehouse floating or fixed in which the goods may chance to be" (*Sanders v. Maclean*, 1883, 11 Q. B. D. 327). As will be seen later, the effect of indorsing a bill of lading on the goods to which it relates depends entirely on the intention with which the indorsement is made. It may be meant to convey the property in the goods, or it may not, e.g. where a bill is indorsed to a custom-house agent for collection.

One kind of question in which the aspect of a bill of lading as a document of title chiefly comes into prominence is that between the holders of different bills of lading for the same goods, where (as is gener-

ally the case) a bill of lading has been drawn in several parts. It is established law that the master of a ship is justified in delivering the goods to the holder of the first bill of lading which is put before him if he has no notice of any other (*Glyn, Mills, & Co. v. East and West India Dock Co.*, 1882, 7 App. Cas. 591), though as between the rival claimants to the goods the property in the goods belongs to the holder of the first bill of lading in order of date (*Barber v. Meyerstein*, 1870, L. R. 4 H. L. 317). In the case of conflicting claims, the master's best course is to interplead, though this may not be possible after he has given two different bills of lading for the goods (*Victor v. British and African S. W. Co.*, W. N., 1888, 84). Where the consignee, if named in the bill of lading, has not got the bill of lading, the shipowner is not protected if he delivers the goods to him (*The Stettin*, 1889, 14 P. D. 142).

Bills of lading are generally negotiable by their terms, *e.g.* the goods being made deliverable "to the order or assigns" of the shipper and consignee. If these words are wanting, it seems that the document is not negotiable (*Henderson v. Comptoir d'Escompte de Paris*, 1873, L. R. 5 P. C. 253). But they are not negotiable in the same way as bills of exchange, *i.e.* in being good against anybody in the hands of a *bonâ fide* holder for value without notice. The mere possession of a bill of lading does not of itself give title or enable the holder to convey the goods. "The indorsement of the bill of lading is simply a direction of the delivery of the goods. When this indorsement is in blank, the holder of the bill of lading may receive the goods, and his receipt will discharge the shipmaster; but the holder, if it came into his hands casually without any just title, can acquire no property in the goods. . . . Possession of a bill of lading cannot have greater force than the actual possession of the goods. Possession of goods is *prima facie* evidence of title; but that possession may be precarious as of a deposit; it may be criminal as of a thing stolen; it may be qualified as of things in the custody of a servant, carrier, or factor; mere possession without a just title gives no property. . . . As the indorsement of a bill of lading is an assignment of the goods themselves, it differs essentially from the indorsement of a bill of exchange, which is the assignment of the debt due to the payee, and which, by the custom of trade, passes the whole interest in the debt so completely that the holder of a bill for a valuable consideration without notice is not affected even by the crime of the person from whom he received the bill" (Lord Loughborough, *Lickbarrow v. Mason*, 1787, 1 Smith L. C. 691, 692; 1 R. R. 425). Possession of the bill of lading must rest on a good title to the goods: "the transfer of the document of title, by means of which actual possession of the goods can be obtained, has no greater effect at common law than the transfer of the actual possession" (Blackburn, J., *Cole v. N. W. Bank*, 1875, L. R. 10 C. P. 362). For this reason the shipper of goods who has no title to them cannot negotiate the bill of lading, which he has been given for them, and the transferee of the bill of lading acquires no right to the goods (*Oyle v. Atkinson*, 1814, 5 Taun. 759; 15 R. R. 647; *Schuster v. McKellar*, *ante*, p. 118; *Finlay v. Liverpool and G. W. S. S. Co.*, 1870, 23 L. T. 251; *Lutscher v. Comptoir d'Escompte de Paris*, 1876, 1 C. P. D. 709).

Another class of cases in which a bill of lading is all-important as a document of title are those between the sellers and buyers of goods to be carried by sea. Where purchasers of goods are made consignees of them by the bills of lading, or have the bills of lading indorsed to them, they can, by indorsement of the bills of lading, defeat the right of the unpaid vendor to stop the goods *in transitu*. The requisites of such indorsement

are that the indorsement must be for value, and made by a person properly authorised to do so; and the conditions necessary to indorsement (if any) specified in the bills of lading, or to be inferred from the conduct of the parties, must be fulfilled. Indorsement of the bill of lading will only have this effect if on shipment the property in the goods is intended to pass to the purchaser; and the shipper can generally protect himself by making the bill of lading deliverable to his order until the purchaser fulfils his part of the contract. Thus where a bill of lading was delivered to a purchaser on his accepting a bill of exchange drawn against certain goods which he afterwards on presentation dishonoured, the shipper was allowed to recover the goods, subject to the rights of the indorsee for value, to whom the purchaser had pledged them (*In re Westzinthus*, 1833, 5 Barn. & Adol. 817; *Kemp v. Falk*, 1882, 7 App. Cas. 573); and it has also been held that the right to stop continues after a sub-sale by the purchaser has taken place, and a bill of lading has been made out in the name of the sub-purchaser, but the purchase-money had not been paid (*Ex parte Golding Davis*, 1880, 13 Ch. D. 628). The form of the bill of lading generally decides whether the property in the goods passes on shipment or not. Thus if the shipper takes the bill of lading to his own order or his assigns, he retains the property in the goods though they are shipped under a contract with a buyer (*Mirabita v. Imperial Ottoman Bank*, 1878, 3 Ex. D. 172), and on board the buyer's ship (*Turner v. Liverpool Dock Trustees*, 1851, 20 L. J. Ex. 293), and have been paid for before they are shipped (*Gabarron v. Kreeft, ante*, p. 120). But the form of the bill of lading is not conclusive, for the governing factor is the intention of the seller; and the seller who ships may be only the buyer's agent; and then, though the bill of lading be drawn to his order, the property in the goods passes to the purchaser (*Coxe v. Harden*, 1813, 4 East, 211; 7 R. R. 570; *Brown v. Hare*, 1859, 4 H. & N. 822; *Joyce v. Swann*, 1864, 17 C. B. N. S. 84); while, on the other hand, the bill of lading may be to the buyer's order, and yet the seller may show that he meant to retain the property in the goods (*Mitchel v. Ede*, 1840, 11 Ad. & Ec. 888; *Moakes v. Nicholson*, 1865, 34 L. J. C. P. 273). Or, again, the property may have passed by the contract; but the shipper, by taking the bill of lading, or having it made out to his order, will retain his lien on the goods, e.g. where the shipper has bought the goods on behalf of the purchaser and paid for them (*Jenkyns v. Brown*, 1849, 19 L. J. Q. B. 286; *Ex parte Miles*, 1885, 15 Q. B. D. 42; *Ex parte Banner*, 1876, 2 Ch. D. 287). Or the indorsement of the bill of lading may be a conditional one, either so expressed, or so implied from the way in which it has come into the hands of its holder; in that case the condition must be satisfied, or the indorsee will have no title to the goods or the bill of lading (*Barrow v. Coles*, 1811, 3 Camp. 92; 13 R. R. 763; *Gurney v. Behrend*, 1854, 23 L. J. Q. B. 265; *The Argentina*, 1867, L. R. 1 Ad. & Ec. 370; *Shepherd v. Harrison*, 1871, L. R. 5 H. L. 116). Where a bill of lading was sent to the agent of the shipper (seller) for goods shipped on account of and at risk of the buyer, and the agent sent the buyer one of the bills of lading, accompanied by a bill of exchange, to be accepted for the price of the goods, it was held that in such circumstances the understood rule was that the bill of exchange must be accepted, or the bill of lading cannot be retained. But sending the bill of lading to agents for the buyer, and the goods being made deliverable to them or their assigns, together with a bill of exchange drawn against the goods, does not retain the property in the shipper (*Key v. Cotesworth*, 1852, 7 Ex. Rep. 595). • "If it is the intention of the vendors to preserve their right in the property till the bill drawn against it is accepted, they ought to transmit the bill of lading

indorsed in blank to an agent to be delivered over in case acceptance takes place" (Parke, B., *ibid.*). See STOPPAGE IN TRANSITU.

Whether the property in the goods which passes by an indorsement be the whole property passing by an absolute sale, or such as passes upon a mortgage, or a special property as upon a pledge only of the goods, depends on the intention of the indorser. This question generally arises in the case of indorsements of bills of lading to banks. In *Barber v. Meyerstein* (*ante*, p. 122) a bill of lading deposited to secure a debt to the creditor (the bank) was held in the Court of Common Pleas and Exchequer Chamber to be a pledge by which the bank only got a special property in the goods for the purpose of satisfying its debt, but in the House of Lords to be a mortgage giving the bank the legal property in the goods, subject to an equity of redemption. In *Mirabita's case* (*ante*, p. 123) a deposit of a bill of lading with a bank was held not to pass the property in the goods, though it was accompanied by bills of exchange drawn against the goods, and discounted by the bank, as against the consignees who tendered payment of the bills of exchange. In *Glyn's case* (*ante*, p. 122) it was doubted whether a deposit of bills of lading with a bank to secure an advance was a mortgage or a pledge; but it was agreed that in either case a legal property and the right of possession passed. In *Sewell v. Burdick* (*ante*, p. 114) an indorsement of the bills of lading to a bank in blank and deposit of them to secure a loan was held not to pass the property within the Bills of Lading Act so as to make the bankers liable to pay freight, and the principle stated by Bowen, L. J., in the Court of Appeal was confirmed by the House of Lords. In *Bristol Bank v. Midland Railway Co.* [1891], 2 Q. B. 653, where bills of lading which had been indorsed to shipper and order against bills of exchange were delivered to a bank, which undertook to meet the bills of exchange, it was held that that amounted to a pledge of the bills of lading and of the goods. And a pledgee of a bill of lading may redeliver the goods to the pledger for a limited purpose without thereby losing his rights under the contract of pledge (*N. W. Bank v. Poynter* [1895], App. Cas. 51).

The validity of a bill of lading as the document of title of the goods continues until there has been delivery of the goods; and it has been held that housing them at a wharf, under a stop for freight, is not a delivery, so that indorsement of the bills of lading after the goods are so housed is effectual to pass the property (*Barber v. Meyerstein*, *sup.*). And even if the master wrongfully deliver the goods to someone not in possession of the bill of lading, that is not a delivery which will avoid a subsequent indorsement of the bill of lading (*Short v. Simpson*, *post*, p. 127; *Pirie v. Warden*, *post*, p. 127; see *Bristol Bank v. Midland Railway Co.*, cited above). "The bill of lading remains in force so long as complete delivery of possession of the goods has not been made to some person having a right to claim them under it" (Willes, J., *Meyerstein v. Barber*, *sup.*). "For many years past there have been two symbols of property in goods imported: the one the bill of lading, the other the wharfinger's certificate or warrant. Until the latter is issued by the wharfinger, the former remains the only symbol of property in the goods" (Martin, B., *ibid.*).

Bills of lading, it has been already pointed out, are generally drawn in sets of several parts; and it is not usual for any purchaser, mortgagee, or pledgee of the property to require presentation of all the different parts to him. The shipowner is discharged if he makes delivery of the goods to the first person properly in possession of one part of the set, even though that part be marked "second," and that marked "first" is still outstanding, but he has no knowledge of its having been indorsed (*Glyn's case*, *ante*, p. 122); and

the master is under no obligation to make inquiry as to what has happened to the other parts (Lord Selborne, *ibid.*, p. 596). And though the House of Lords has disapproved of this practice as giving opportunities for fraud on the part of the original holders of bills of lading, by negotiating different parts to different persons for value, the Court of Appeal held very shortly afterwards that a tender of two parts of a bill of lading to a purchaser of the goods was enough, where the other part had not been dealt with (*Sanders v. Maclean*, *ante*, p. 121).

The rules of the common law strictly limiting the power of persons in possession of goods or their documents of title to dispose of them to cases where they have due authority from the owners of the goods, have been greatly qualified by the Factors Acts, the existing one being that of 1889. That statute makes bills of lading "documents of title to goods," and enables mercantile agents of goods put in possession of them by their owners to make valid dispositions, whether by sale, mortgage, or pledge of such goods; and allows persons who after sale continue in possession of the goods to give a good title to persons who are *bona fide* transferees of them without notice; as also persons who after agreeing to buy goods contrive to get possession of them without paying therefor, to give a good title to persons buying from them under the like conditions of *bona fides* and want of notice of fraud; and the Sale of Goods Act, 1893, is to the same effect. For an account of the law relating to such dispositions, see FACTORS.

Although the bill of lading has from very early times been recognised as the symbol of property in the goods, so that indorsement of it passed the property and all such rights of action as an owner has to the indorsee, until 1855 the contract contained in the bill of lading was not assignable by indorsement, but had to be enforced by or in the name of the consignor or shipper of the goods. The preamble of the Bills of Lading Act of that year makes this clear: "Whereas by the custom of merchants a bill of lading being transferable by indorsement, the property in the goods may thereby pass to the indorsee, but nevertheless all rights in the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property." And the statute thereupon enacts: "Every consignee of goods named in a bill of lading and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself" (s. 1). The rights under the contract thus follow the property in the hands of consignees named in the bill of lading and of indorsees.

Any indorsement which passes the property confers the right to sue in respect of the goods covered by the bill of lading for breaches of contract arising before as well as after the indorsee becomes owner of the goods (*Short v. Simpson*, *post*, p. 127; *The Wilhelm Schmidt*, 1871, 25 L. T. 34; *Bristol Bank v. Midland Railway Co.*, *ante*); and the owner of a cargo, which had been damaged on board ship, has been allowed, after selling it at a price depreciated by that damage, to sue the shipowner for the damage (*The Marathon*, 1879, 40 L. T. N. S. 163). Whether there is any difference between a special indorsement (*i.e.* to a specified person) and a blank one (simply indorsed with the indorsee's name) for the purposes of the Act is doubtful\* (Lord Selborne suggesting there might be, Lord Blackburn \*not—*Sewell v. Burdick*, 1884, 10 App. Cas. pp. 83, 93).

The indorsee is not affected by any arrangements between the original

parties to the bill of lading which do not appear therein (*Leduc v. Ward, ante*, p. 114), though they would prevent the enforcement of the contract (*The Emilien Marie, ante*, p. 113); nor by their liabilities dehors of that contract in respect of other goods (*The Hélène*, 1866, L. R. 1 P. C. 235, Dr. Lushington). The rights of the indorsee are limited by the terms of the bill of lading, in the same way as his liabilities (*Thorman v. Burt, ante*, p. 113). An indorsee may indorse the bill of lading to another person, and thereby pass to him his rights and liabilities under it (*Smurthwaite v. Wilkins*, 1862, 11 C. B. N. S. 84); but not to an agent, unless the shipowner agrees to accept his liability (*Lewis v. M'Kee*, 1866, L. R. 2 Ex. 37); and mere sale of the goods will not release the seller from the liabilities under the contract if the bill of lading is not transferred (*The Felix*, 1868, L. R. 2 Ad. & Ec. 273; *Fowler v. Knoop*, 1878, 4 Q. B. D. 299). By the Act the shipowner has reserved to him his right to freight against the shipper, even though the bill of lading has been indorsed (*Fox v. Nott*, 1861, 6 H. & N. 637); and while the "rights of suit" are transferred by indorsement, the "liabilities" are not expressed to be so except that the consignee or indorsee is to be subject to the same liabilities as if the contract contained in the bill of lading had been made with himself. But there seems to be no doubt that the latter pass equally with the former (*Glyn, Mills, & Co. v. East and West India Dock Co.*, 6 Q. B. D. at p. 480, Brett, L. J.).

The Act further provides that in order to pass the rights and liabilities under the contract "the property in the goods must pass upon or by reason of such consignment or indorsement." The fact of indorsement for value to the holder of a bill of lading is *prima facie* evidence that he acquires the property thereby (*Dreacchi v. Anglo-Egyptian N. C.*, 1868, L. R. 3 C. P. 190). Various decisions under the Admiralty Court Act, 1861, where a right of action in Admiralty is given to any "owner or consignee or assignee of any bill of lading of any goods carried into any English or Welsh port by a foreign ship," have established that a consignee for sale, to whom the bill of lading was indorsed against their acceptance of a bill of exchange for nearly the full value of the goods, could sue, being a consignee to whom the legal property had passed (*The Freedom*, 1871, L. R. 3 P. C. 599; *The Figlia Maggiore*, 1868, L. R. 2 Ad. & Ec. 106); and that the consignee of a bill of lading to whom *a* but not *the* property in the goods passed can sue under the Act (*The Nepoter*, 1869, L. R. 2 Ad. & Ec. 378, Sir R. Phillimore), though in an earlier case it had been held that *the* property must pass to enable such consignee or assignee to sue (*The St. Cloud*, 1863, B. & L. 4. 16, Dr. Lushington). It was pointed out in *Sewell v. Burdick* that for the purpose of the Admiralty Court Act *a* property may be enough to found a right to sue upon in respect of the goods. But as regards the Bills of Lading Act, the property means at least the full legal property; and if the bill of lading be merely indorsed as a pledge, the person with whom it is pledged has not the liabilities or rights of the contract transferred to him (*Sewell v. Burdick, ante*, p. 114). It has thus been held by the Privy Council that owners of cargo, who had indorsed their bills of lading to a bank to secure advances, retained an interest in the cargo sufficient to enable them to sue for damage done to it by collision, the money thereby recovered being for the benefit of the parties shown to be entitled thereto (*The Glamorganshire*, 1888, 13 App. Cas. 454). The property in the goods must, in order to transfer the rights of contract, "pass by reason of consignment or indorsement"; and if the goods already before indorsement belong to the indorsee, he gets no right to sue thereby (*De Cauxier v. Wyllie*, 1887, 17 Sess. Ca. (4th) 167). The indorsement must also be

made while the bill of lading is a living instrument, *i.e.* before delivery of the goods, except where the goods have been improperly delivered to a person not holding the bill of lading (*Short v. Simpson*, 1866, L. R. 1 C. P. 240; *Pirie v. Warden*, 1871, 9 Sess. Ca. (3rd) 523). Unless the bill of lading is expressed to be "to assignee" or "to assigns," the rights under it are not transferable by indorsement (*Henderson v. Comptoir d'Escompte de Paris*, *ante*, p. 122).

[See Carver, *Carriage by Sea*; Scrutton, *Charter-Parties and Bills of Lading*; Lawes, *Charter-Parties and Bills of Lading*; Leggett, *Bills of Lading*.]

**Bills of Mortality** were weekly returns of deaths, begun in 1592, in the parishes of the city of London. In 1605 six contiguous parishes in Middlesex and Surrey were included; in 1626 the city of Westminster; in 1636 Hackney, Islington, Lambeth, Newington, Stepney, and Redriff (or Ratcliffe). The bills were prepared by clerks, under the supervision of the company of parish clerks, from materials collected by searchers. The bills were utterly inaccurate. They ceased after 1842 (see Ann. Reg. 1842, p. 378), when the Births and Deaths Registration Act of 1836 had been got into working order, being superseded by the Registrar-General's returns (Ann. Reg. 1843, p. 436). See Pulling, *City of London*, 264.

The area within the weekly bills of mortality was selected for the Acts as to paving and buildings, which culminated in the Metropolitan Management Acts. The first of these were passed in 1689 (2 Will. & Mary, Sess. 2, c. 8) and 1696 (8 & 9 Will. III. c. 37). All the public ones are repealed by the Metropolitan Fire Brigade Act of 1865, 28 & 29 Vict. c. 90, except ss. 83, 86 of 14 Geo IV. c. 78, which have been construed as extending to the whole of England (*Ex parte Goreley*, 1864, 4 De G. J. & S. 477), though this construction has been doubted on high authority (*Westminster Fire Office v. Glasgow Provident Investment Society*, 1888, 13 App. Cas. 699, 713, 716), and in the Short Titles Act of 1896 the Act of 1774 is styled the Fires Prevention (Metropolis) Act, 1774.

**Bills of Sale.**—The term bill of sale, in its original sense, meant an instrument whereby the property in personal chattels was transferred under a contract of sale. In this sense it is still used in connection with the transfer of property in ships, delivery of a bill of sale being a substitute for delivery of possession (see SHIP). It gradually came to apply to mortgages as well as sales; it also came generally to include the implication that actual possession of the chattels was not given to the purchaser or mortgagee, though a bill of sale often recited, and was accompanied by, a symbolical delivery of possession. This implication underlies the widely extended use of the term in recent times in connection with the Bills of Sale Acts.

The Bills of Sale Acts now in force are the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31); the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43); the Bills of Sale Act, 1890 (53 & 54 Vict. c. 53); and the Bills of Sale Act, 1891 (54 & 55 Vict. c. 35).

The Act of 1878 followed the main lines of the Act of 1854, making void against creditors any bill of sale which had not been registered within seven days of its date. If a bill of sale was not registered, and the chattels remained in the possession, or apparent possession, of the grantor, an execu-



tion creditor or trustee in bankruptcy was thus relieved of the burden of proof of fraud. Moreover, the Act required that a bill of sale should be attested, and that the residence and occupation of the attesting witnesses, as well as of the grantor, should be verified by affidavit, so that creditors might have information to guide their inquiries into the *bona fides* of the transaction. The Act applied equally to absolute bills of sale and to bills of sale given by way of security. No distinction, indeed, was drawn between them, except this: it was provided that if a bill of sale was not absolute, but was given by way of security, the terms of the "defeasance, condition, or declaration of trust" must appear on the register. The Act, in short, was intended to protect creditors. It did not avoid a bill of sale in the interest of the grantor, or interfere in any way with the contract between grantor and grantee. In 1882 the Legislature took a new departure for the purpose of protecting borrowers, as well as their general creditors, against oppressive dealings by money-lenders who advanced money on the security of bills of sale. The Amendment Act of that year applies to bills of sale given by way of security for the payment of money on or after 1st November 1882. It regulates the form in which the contract is to be expressed, the operation of the bill of sale as an assignment of chattels, and the right of the grantee to take possession of the chattels and realise his security. The Act of 1890, as amended by the Act of 1891, exempts from the operation of the Acts certain instruments dealing with imported goods, which are said to be used principally at Liverpool.

As a result of this repeated legislation, bills of sale must be divided according to the date of their execution into four classes—(1) bills of sale executed after the commencement of the Act of 1854, and before 1st January 1879 (see Act of 1878, s. 23; *Cookson v. Swire*, 1884, 9 App. Cas. 653; *Paine v. Matthews*, 1885, 53 L. T. 872; *Ex parte Official Receiver, In re Emery*, 1888, 21 Q. B. D. 405); (2) bills of sale given on or after 1st January 1879 otherwise than by way of security for the payment of money, which are governed by the Act of 1878; (3) bills of sale given on or after 1st November 1882 by way of security for the payment of money, which are governed by the Act of 1882; and (4) bills of sale by way of security for the payment of money, executed on or after 1st January 1879, and duly registered before 1st November 1882, which are governed by the Act of 1878, and are not affected by the Act of 1882 "so long as the registration thereof is not avoided by non-renewal or otherwise" (Act of 1882, s. 3).

*Definition of Personal Chattels.*—The operation of the Acts is circumscribed by the definition of "personal chattels" (Act of 1878, s. 4). This expression means "goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops." The words "separately assigned or charged" are not satisfied by separate words of assignment, or a power to serve and sell, in a conveyance of the land or building to which the fixtures are affixed, or the land on which crops grow (*ibid.* s. 7). The expression "personal chattels" does not include "fixtures (except trade machinery, as hereinafter defined) when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow." The term "trade machinery," thus called into existence for the purpose of dealing with fixtures comprised in a conveyance of land, is defined by sec. 5; which also enacts that this exceptional class of fixtures "shall, for the purposes of this Act, be deemed to be personal chattels." Further, the term "personal chattels" does not include "chattel interests in real estate, nor shares or

interests in, the stock funds or securities of any Government, or in the capital or property of incorporated or joint-stock companies, nor choses in action, nor any stock or produce upon any farm or lands which, by virtue of any covenant or agreement, or of the custom of the country, ought not to be removed from any farm where the same are at the time of making or giving" of the bill of sale. The most important class of choses in action is book debts.

*Transactions outside the Acts.*—Two principles of fundamental importance limit the operation of the Bills of Sale Acts.

(1) The Acts do not apply to any transaction unless it is dependent on some document which comes within the definition of a bill of sale in sec. 4 of the Act of 1878, or which is deemed to be a bill of sale under sec. 5 or sec. 6. A sale of goods, or a charge upon goods, which is effected by parol, and can be proved by parol evidence, is altogether outside the Acts. So is a lien which is given by law without any writing (*In re Vulcan Iron Works*, 1888, W. N. 37). A receipt or other document accompanying a sale of, or charge on, chattels, but not intended as an assurance or a reduction into writing of the transaction, is not within the Acts (*Newlove v. Shrewsbury*, 1888, 21 Q. B. D. 41). If a formal document is given, the test is whether there was a complete transaction before the document was given and independently of it, so that the title of the holder does not depend on it; if so, the transaction is not within the Acts (*Woodgate v. Godfrey*, 1879, 5 Ex. D. 24; *Marsden v. Meadows*, 1881, 7 Q. B. D. 80; *Manchester, etc., Railway Co. v. North Central Wagon Co.*, 1888, 13 App. Cas. 554). This principle is sometimes expressed in the phrase that the Acts strike at documents, not transactions.

(2) The Acts do not apply to "any case where the object and effect of the transaction are immediately to transfer the possession from the grantor to the grantee" (Cave, J., *Ex parte Close, In re Hall*, 1884, 14 Q. B. D. 386). This principle may be regarded as an inference from the general scope of the Acts which were intended to apply to cases where goods remained in the possession, or apparent possession, of the grantor, while the property in them, or a right to take possession of them, had been assigned to the grantee. Or it may be deduced from the express provision that the Acts are to apply to every bill of sale, "whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale" (Act of 1878, s. 3). The application of this principle is of great importance. It takes out of the Acts transactions of sale where the possession as well as the property passes by the contract of sale (*Ramsay v. Murgrett* [1894], 2 Q. B. 18), parol gifts of chattels completed by actual delivery of possession (see *Kilpin v. Ratley* [1892], 1 Q. B. 582), and cases of pledge or lien, where the security is dependent upon the actual delivery of possession (*Ex parte Hubbard, In re Hardwick*, 1886, 17 Q. B. D. 690; *Hilton v. Tucker*, 1889, 39 Ch. D. 669), or where the security is intended to operate only when possession of the goods has actually been received (*Morris v. Delobel-Flipo* [1892], 2 Ch. 352). If the goods are in the possession of a bailee, possession may be given without any physical change of possession, e.g. by delivery of a delivery order (*Grigg v. National Guardian Assurance Co.* [1891], 3 Ch. 206). If possession is actually given, it makes no difference that the terms of the transaction are reduced to writing; for "although you might be obliged to have recourse to the document if there was a controversy about the terms of the advance, nevertheless you do not need to have recourse to it for the purpose of establishing title" (*Charlesworth*

*v. Mills* [1892], App. Cas. 231). On the same principle, a clause in a building agreement providing that all building materials brought by the builder upon the land should become the property of the landowner, is not within the Acts; for a legal right to the materials attaches whenever they are brought upon the landlord's premises, and until then he has no title to them, legal or equitable (*Reeves v. Barlow*, 1884, 12 Q. B. D. 436).

*Documents requiring Registration as Bills of Sale.*—The definition of a bill of sale (Act of 1878, s. 4) comprises three classes of documents dealing with personal chattels. This inclusive test must be read in close connection with the two principles already mentioned; but unless a document comes within one of these three distinct classes, it is not a bill of sale within the Acts. These three classes are as follows: (1) "Bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels." The word "assurance" here qualifies the preceding words; and in order to be an assurance the document must be one "on which the title of the transferee of the goods depends, either as the actual transfer of the property, or an agreement to transfer, or as a muniment or document of title taken at the time as a record of the transaction" (*Marsden v. Meadows*, 1881, 7 Q. B. D. 80; *North Central Wagon Co. v. Manchester, etc., Railway Co.*, 1887, 35 Ch. D. 191; *Newlove v. Shrewsbury*, 1888, 21 Q. B. D. 41). A memorandum of an agreement to sell, reduced into writing at the time, and containing the terms of the contract (*Brantom v. Griffiths*, 1876, 1 C. P. D. 349; 1877, 2 C. P. D. 213), and an entry in an auctioneer's books, which was essential to the validity of the sale under sec. 17 of the Statute of Frauds (*In re Roberts, Evans v. Roberts*, 1887, 36 Ch. D. 196), have been held to be assurances of chattels and therefore bills of sale. But "suppose that upon the 1st of January goods are sold and the price is paid, but that the buyer does not take possession of them, and suppose that upon the 1st of July a bill of sale of the same goods is executed between the same parties; the omission to register the bill of sale will not affect the transaction and annul the sale of the goods, which has taken place six months before" (Jessel, M. R., *Woodgate v. Godfrey*, 1879, 5 Ex. D. 24).

(2) "Powers of attorney, authorities or licences to take possession of personal chattels as security for any debt." These words are only applicable to documents which are consistent with the possession of the goods remaining in the grantor (*Ex parte Hubbard, In re Hardwick*, 1886, 17 Q. B. D. 690). They do not include a power of distress for rent in an ordinary lease. But they include a proviso in a brewer's lease, enabling the landlord to distrain for the price of liquor supplied to the tenant (*Pulbrook v. Ashby*, 1887, 56 L. J. Q. B. 376; *Stevens v. Marston*, 1890, 60 L. J. Q. B. 192). So, if a lease of one house contained a power to distrain for the rent thereof upon chattels in another house, it would be within the definition (per Stirling, J., *In re Roundwood Colliery Co.* [1897], 1 Ch. 373; cp. Rigby, L. J., *ibid.*). A proviso in a building agreement enabling the landowner to re-enter upon the builder's default, and providing that on such re-entry all building materials on the land should be forfeited to and become the property of the landowner, "as and for liquidated damages," is not within the definition, since possession is not to be taken "as security for any debt" (*Ex parte Newitt, In re Garrud*, 1881, 16 Ch. D. 522). A *bonâ fide* hiring agreement whereby the owner reserves power to resume possession upon the hirer's default is not within the definition, the hirer not being the owner of the chattels (*Ex parte Craucour, In re Robertson*, 1878, 9 Ch. D. 419; *M'Entire v. Crossley* [1895], App. Cas. 457). But where a person has sold chattels, and hired them

back from the buyer, the whole transaction may be a sham, and the chattels may remain his property either at law or in equity; in such a case the hiring agreement may operate either as an assurance of the chattels or as a licence to take possession of them as security for a debt, so as to come within the definition of a bill of sale (*Ex parte Official Receiver, In re Watson*, 1890, 25 Q. B. D. 27; *Madell v. Thomas* [1891], 1 Q. B. 230; *Beckett v. Tower Assets Co.* [1891], 1 Q. B. 638).

(3) "Any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred." These words were not in the Act of 1854; but even under that Act it was held that the previous words, "other assurances of personal chattels," included assurances in equity (*Ex parte Mackay, In re Jeavons*, 1873, L. R. 8 Ch. 643), and any equitable security giving a right to take possession through the agency of the Court (*Edwards v. Edwards*, 1876, 2 Ch. D. 291). The new words were intended to bring within the Act documents which create a right in equity as distinct from a right at law (*Reeves v. Barlow*, 1883, 12 Q. B. D. 436). They have been held to include a clause in an agreement for the sale of a business and stock-in-trade, conferring on the vendors a lien or charge for the unpaid purchase-money (*Coburn v. Collins*, 1887, 35 Ch. D. 373; *Cranfield v. Cranfield*, 1889, 23 L. R. Ir. 555; but see *Ex parte Slater, In re Webber*, 1891, 64 L. T. 426). So, a mortgage of a lease which contains a contract to assign the furniture on the demised premises is a bill of sale of the furniture within this definition (*Baghott v. Norman*, 1880, 41 L. T. 787).

Any instrument falling within one of these three classes is a bill of sale. It is immaterial whether it is absolute or by way of security. But the effect of the Act of 1882 is that every bill of sale made or given by way of security for the payment of money by the grantor must be an assurance in accordance with the statutory form, and instruments of the second and third classes are therefore no longer valid as such securities.

Certain instruments, however, are expressly excepted by statute from the definition (Act of 1878, s. 4). These are: assignments for the benefit of the creditors of the person making or giving the same (the test being whether every creditor has a right to come in and take the benefit of the deed; *Hadley v. Beedom* [1895], 1 Q. B. 646); marriage settlements (which include marriage articles; *Wenman v. Lyon* [1891], 1 Q. B. 634; in C. A. [1891], 2 Q. B. 192; but not postnuptial settlements; *Fowler v. Foster*, 1859, 28 L. J. Q. B. 210; *Casson v. Churchley*, 1884, 53 L. J. Q. B. 335); transfers or assignments of any ship or vessel, or any share thereof (the word "ship" not being restricted to British ships; *Union Bank of London v. Lenanton*, 1878, 3 C. P. D. 243; and the word "vessel" including a barge or anything beyond a mere boat; *Gapp v. Bond*, 1887, 19 Q. B. D. 200); transfers of goods in the ordinary course of any trade or calling (see *Tennant v. Howatson*, 1888, 13 App. Cas. 489); bills of sale of goods in foreign parts or at sea (as to chattels in Scotland, see *Coote v. Jecks*, 1872, L. R. 13 Eq. 597; in Ireland, see *Brooks v. Harrison*, 1880, 6 L. R. Ir. 85, 332); bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented (a general exception of well-known business documents, the delivery of which is equivalent to delivery of possession of the goods). The Act of 1890, as amended by the

Act of 1891, further excepts from the Acts any instrument "charging or creating any security on, or declaring trusts of imported goods, given or executed at any time prior to their deposit in a warehouse, factory, or store, or to their being reshipped for export, or delivered to a purchaser not being the person giving or executing such instrument."

Another important exception has been created by judicial decision. Mortgages or charges of any incorporated company, for the registration of which statutory provision had been made by the Companies Clauses Act, 1845, or the Companies Act, 1862, are not within the scope of the Bills of Sale Acts (*In re Standard Manufacturing Co.* [1891], 1 Ch. 627). But this rule does not take out of the Act of 1878 an absolute bill of sale by an incorporated company. Moreover, the word "company" does not include a society registered under the Industrial and Provident Societies Acts (*Great Northern Railway Co. v. Coal Co-operative Society Ltd.* [1896], 1 Ch. 187).

There remain two important classes of instruments which are affected by the Acts, viz.: modes of disposition of trade machinery (Act of 1878, s. 5), and attornments and other instruments giving powers of distress to secure a debt or advance (*ibid.* s. 6). These are not within the definition of a bill of sale contained in sec. 4 of the Act of 1878, but are respectively to be "deemed to be bills of sale within the meaning of that Act." They are more conveniently dealt with by themselves at the end of this article.

A transfer or assignment of a registered bill of sale need not be registered (Act of 1878, s. 10; *Ex parte Turquand*; *In re Parker*, 1885, 14 Q. B. D. 636).

No action will lie for the wrongful registration of a document erroneously supposed to be a bill of sale, unless the plaintiff proves malice and want of reasonable and probable cause (*Horsley v. Style*, 1893, 69 L. T. 222).

*Requirements ancillary to Registration; Statement of Consideration.*—A bill of sale must not only be registered; it must also be duly attested, and it must truly set forth the consideration for which it was given (Act of 1878, s. 8; Act of 1882, s. 8).

The mode of registration is considered in the next section. The mode of attestation is different in the case of absolute bills of sale, and of bills of sale by way of security. It is accordingly dealt with under each of these headings. It is, however, desirable to state here the leading principles which may be elicited from the numerous decisions on the subject of statement of consideration.

If the consideration is an existing debt, independent of the contract for the bill of sale, and the parties *bond fide* agree to treat it as a new advance, it may be sufficient to state it as money "now paid by the grantee to the grantor," though no money actually passes (*Credit Co. v. Pott*, 1880, 6 Q. B. D. 295; *Ex parte Bolland*, *In re Roper*, 1882, 21 Ch. D. 543; *Ex parte Johnson*, *In re Chapman*, 1884, 26 Ch. D. 338; *Ex parte Turbuck*, *In re Smith*, 1894, 43 W. R. 206). The same rule applies when a new bill of sale is given in substitution for a void or doubtful bill of sale (*Ex parte Allam*, *In re Munday*, 1884, 14 Q. B. D. 43; *Ex parte Nelson*, *In re Hockaday*, 1887, 35 W. R. 264). But if the consideration represents liability or acceptances not yet due, it is not truly stated as money "now paid" or "now owing" (*Mayer v. Mindlevich*, 1888, 59 L. T. 400; *Richardson v. Harris*, 1889, 22 Q. B. D. 268; *Darlow v. Bland* [1897], 1 Q. B. 125); and if there is an agreement that a sum payable *in futuro* is to be taken as represented by a less present sum the agreement ought to be stated (*Cochrane v. Moore*, 1890, 25 Q. B. D. 57). Money paid to third persons by the grantor's direction may be stated as money paid to the grantor when that is the effect of the transaction according to the ordinary understanding of business men (*Hamlyn v. Betteley*,

1880, 5 C.P. D. 327; *Ex parte Challinor, In re Rogers*, 1880, 16 Ch. D. 260; *Ex parte Hunt, In re Cann*, 1884, 13 Q. B. D. 36; *Peace v. Brookes* [1895], 2 Q. B. 451). But if the transaction is in substance a loan to the third party it is not truly stated as money paid to the grantor (*Heseltine v. Simmons*, 1892, 8 T. L. R. 500; in C. A. [1892], 2 Q. B. 547). Money retained by the grantee, with the grantor's assent, in satisfaction of a *bond fide* debt due to him prior to and independent of the contract, may be truly stated as "paid to the grantor" (*Ex parte National Mercantile Bank, In re Haynes*, 1880, 15 Ch. D. 42; *Ex parte Firth, In re Cowburn*, 1882, 19 Ch. D. 419; *Richardson v. Harris*, 1889, 22 Q. B. D. 268). But money retained or deducted by the grantee in respect of interest, commission, expenses, or debts arising out of the transaction, must not be stated as paid to the grantor (*Ex parte Charing Cross Bank, In re Parker*, 1880, 16 Ch. D. 35; *Hamilton v. Chaine*, 1881, 7 Q. B. D. 319; *Ex parte Firth, In re Cowburn*, 1882, 19 Ch. D. 419; *Richardson v. Harris*, 1889, 22 Q. B. D. 268). Nor is it sufficient to state as money "now paid" to the grantor money which is not paid at the time but only agreed to be paid to him or on his behalf some time after the date of the deed (*Ex parte Rolph, In re Spindler*, 1881, 19 Ch. D. 98; *Bishop v. Consolidated Credit Corporation*, 1889, 5 T. L. R. 378; *Criddle v. Scott*, 1895, 11 T. L. R. 222). A collateral agreement as to the application of the consideration money need not be stated (*Ex parte National Mercantile Bank, In re Haynes*, 1880, 15 Ch. D. 42; *Thomas v. Searles* [1891], 2 Q. B. 408).

*Registration and Renewal of Registration.*—The business of the registry of bills of sale is performed in the Bills of Sale Department of the central office of the Supreme Court. The masters of the Supreme Court execute the office of registrar, and any one of the masters may perform all or any of the duties of the registrar (Act of 1878, s. 13; R. S. C., 1883, Order 61, rr. 1, 25). The functions of the registrar are merely ministerial and not judicial; he has no power to reject an affidavit because he thinks it does not comply with the requirements of the Act (*Needham to Johnson*, 1867, 8 B. & S. 190; *Jessel, M. R., Ford v. Kettle*, 1882, 9 Q. B. D. 139). But a bill of sale is not to be registered "unless the original, duly stamped, is produced to the proper officer" (Stamp Act, 1891, s. 41). As to the stamp duties payable on bills of sale, cp. *Reed's Bills of Sale Acts*, pp. 219–222. Weir on *Bills of Sale*, p. 239.

The mode of registration is as follows:—The original of the bill of sale, with every schedule or inventory thereto annexed, or therein referred to, and also a true copy (that is, a copy which is true in all essential particulars; *Sharp v. M'Henry*, 1887, 38 Ch. D. 427) of the bill of sale, of every schedule or inventory, and of every attestation of the execution of the bill of sale, must be presented to the registrar, along with an affidavit verifying (1) the date when the bill of sale was made or given; (2) its due execution and attestation; (3) the residence, and (4) the occupation (a) of the grantor (or person whose goods were sold under process of Court), and (b) of every attesting witness. The copy and the affidavit are filed with the registrar (Act of 1878, s. 10). This must be done within seven clear days; but if the registrar's office is closed on the last day for registration, registration on the next day on which the office is open is valid (Act of 1878, s. 22). If a bill of sale is executed out of England it may be registered within seven clear days after the time at which it would in the ordinary course of post arrive in England if posted immediately after the execution thereof (Act of 1882, s. 8).

The affidavit must be prepared with care, since any material flaw in it

will render the registration void. It must show that the attesting witness was present and saw the execution of the bill of sale; it is not sufficient to verify the signature of the witness to the attestation clause (*Sharpe v. Birch*, 1881, 8 Q. B. D. 111; *Ford v. Kettle*, 1882, 9 Q. B. D. 139; *Cooper v. Zeffert*, 1883, 32 W. R. 402). The description of residence and occupation refers to the date of swearing the affidavit, not of the bill of sale, if there has been a change in the meantime (*Button v. O'Neill*, 1879, 4 C. P. D. 354). But if the description is in fact true, it is sufficient that the deponent speaks only to the "best of his belief" (*Roe v. Bradshaw*, 1866, L. R. 1 Ex. 106). The bill of sale cannot be looked at to supply the omission of residence or occupation from the affidavit (*Hatton v. English*, 1857, 7 El. & Bl. 94; *Brodrick v. Scalé*, 1871, L. R. 6 C. P. 98), though the affidavit may verify the description in the bill of sale by express reference (*Banbury v. White*, 1863, 32 L. J. Ex. 258). So the bill of sale may be referred to, to explain and supplement the description (*Jones v. Harris*, 1871, L. R. 7 Q. B. 157), but not to correct it (*Murray v. Mackenzie*, 1875, L. R. 10 C. P. 625). It is generally sufficient to state, as the residence, the place of business where the witness can be found during business hours (*Blackwell v. England*, 1857, 27 L. J. Q. B. 124; *Attenborough v. Thompson*, 1857, 27 L. J. Ex. 23; *Hewer v. Cox*, 1860, 30 L. J. Q. B. 93). As to what is sufficient minuteness of description, see *Briggs v. Boss*, 1868, L. R. 3 Q. B. 268; *Jones v. Harris*, 1871, L. R. 7 Q. B. 157. A description which is true and sufficient is not vitiated by a subsequent erroneous addition which cannot mislead (*Heron v. Cox*, 1860, 30 L. J. Q. B. 73; *Ex parte M'Hattie, In re Wood*, 1878, 10 Ch. D. 398; *Blount v. Harris*, 1878, 4 Q. B. D. 603). If the party carries on business at more places than one, it is not essential to state them all (*Ex parte Probyn*, 1880, 24 Sol. J. 344; *Greenham v. Child*, 1889, 24 Q. B. D. 29). If the grantor or witness has no occupation he may be described as a gentleman (*Bath v. Sutton*, 1858, 27 L. J. Ex. 388; *Gray v. Jones*, 1863, 14 C. B. N. S. 743; *Smith v. Cheese*, 1875, 1 C. P. D. 60), or as "now in no occupation" (*Trousdale v. Sheppard*, 1862, 14 Ir. C. L. Rep. 370), or as a "gentleman of no occupation" (*Feast v. Robinson*, 1894, 63 L. J. Ch. 321), or the description may be left blank (*Ex parte Young, In re Symonds*, 1880, 28 W. R. 924). But if the party impeaching the registration can prove that the grantor or witness thus described had, in fact, an occupation, the registration will be invalid. Thus such a description has been held bad in the case of a clerk in the Audit Office (*Allen v. Thompson*, 1856, 25 L. J. Ex. 249); an attorney's clerk (*Tuton v. Sanoner*, 1858, 27 L. J. Ex. 293; *Beales v. Tennant*, 1860, 29 L. J. Q. B. 188); a buyer of silk (*Adams v. Graham*, 1864, 33 L. J. Q. B. 71); a lessee and manager of a theatre (*Ex parte Hooman, In re Vining*, 1870, L. R. 10 Eq. 63); or a commercial traveller (*Matthews v. Buchanan*, 1889, 5 T. L. R. 373). On the same principle the description "married woman" or "widow" will be bad if it is proved that the person so described had an occupation (*Luckin v. Hamlyn*, 1869, 21 L. T. 366; *Ex parte Chapman, In re Davey*, 1881, 45 L. T. 268; *Usher v. Martin*, 1889, 61 L. T. 778). As to what description of occupation is sufficiently specific, see *Briggs v. Boss*, 1868, L. R. 3 Q. B. 268; *Larchin v. North-Western Deposit Bank*, 1875, L. R. 10 Ex. 64. If a party carries on more than one business, it is not essential to state them all, unless the omission of any would be misleading (*Throssell v. Marsh*, 1885, 53 L. T. 321; *In re Fitzpatrick*, 1886, 19 L. R. Ir. 206). An absolutely untrue description is, of course, fatal (*Cooper v. Davis*, 1884, 32 W. R. 329). But if the description gives a true indication of his vocation in life, by which the party can be identified, it is not bad merely because he is out

of employment, or has not been doing anything in his business for some time (*Sharp v. M'Henry*, 1887, 38 Ch. D. 437; *Martinson v. Consolidated Co. Ltd.*, 1889, 5 T. L. R. 353).

Affidavits may be sworn before a master of any Division of the High Court, or before a commissioner to take affidavits (Act of 1878, s. 17), or before any first or second class clerk in the Bills of Sale Department (R. S. C., Bills of Sale Acts, 1878 and 1882, r. 12). But no affidavit is sufficient if sworn before the solicitor acting for the holder of the bill of sale, or any agent or correspondent of such solicitor; and any affidavit which would be insufficient if sworn before the solicitor himself is insufficient if sworn before his clerk or partner (R. S. C., 1883, Order 38, rr. 16 and 17; *Baker v. Ambrose* [1896], 2 Q. B. 372). Whoever wilfully makes or uses a false affidavit will be deemed guilty of wilful and corrupt perjury (Act of 1878, s. 17).

If a bill of sale is made or given "subject to any defeasance, or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration thereof, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void" (Act of 1878, s. 10). The object of this enactment is that creditors may be truly informed whether the grantor retains any, and what, interest, legal or equitable, in the chattels assigned by the bill of sale. But it would appear that in all ordinary cases the effect of such a defeasance, condition, or declaration of trust is to make the instrument a bill of sale in security for the payment of money by the grantor; and by force of the Act of 1882, the terms on which the grantor may redeem the chattels must now appear in the body of the deed (see *post*, p. 139).

The date of registration determines the priority of bills of sale comprising in whole or in part any of the same chattels (Act of 1878, s. 10). This provision regulates the priority of bills of sale *inter se* and independent of execution or bankruptcy (*Connelly v. Steer*, 1881, 7 Q. B. D. 520), and it applies even if the grantee of the prior unregistered deed has taken possession (*Lyons v. Tucker*, 1881, 7 Q. B. D. 523). It applies to absolute assignments as well as to assignments by way of security (*Tuck v. Southern Counties Deposit Bank*, 1889, 42 Ch. D. 471).

The registration of a bill of sale must be renewed once at least every five years; otherwise the registration becomes void. The renewal of registration is effected by filing with the registrar an affidavit stating (1) the date of the bill of sale and of the last registration thereof; (2) the names, residences, and occupations of the parties thereto as stated therein (see *Ex parte Webster, In re Morris*, 1882, 22 Ch. D. 136); and (3) that the bill of sale is still a subsisting security (Act of 1878, s. 11). A renewal of registration does not become necessary by reason only of a transfer or assignment of a bill of sale (*ibid.*).

The registrar keeps a book or "register" in which are entered the name, residence, and occupation of the grantor, and certain other particulars, and also keeps an "index" in which the names of grantors are entered under the letters of the alphabet, with references to the entries in the register (Act of 1878, s. 12). Any person may search the "register," and may inspect or make certain extracts from any registered bill of sale (Act of 1882, s. 16). Office copies or extracts of any registered bill of sale and affidavit, or of a registered affidavit of renewal, may be obtained from the central office. An office copy is admitted in all Courts as *prima facie*



evidence of the bill of sale or affidavit, and of the fact and date of registration as shown thereon (Act of 1878, s. 16). Registration is not proved by producing the bill of sale along with a certificate of registration (*Emmott v. Marchant*, 1878, 3 Q. B. D. 555; *Turner v. Culpan*, 1888, 36 W. R. 278).

A judge of the High Court has power to rectify the "register," or to extend the time for registration or renewal (Act of 1878, s. 14). But there is no power to rectify an omission or misstatement in a registered affidavit (*Crew v. Cummings*, 1888, 20 Q. B. D. 535; in C. A. 21 Q. B. D. 420), nor can the jurisdiction be exercised after an execution creditor or a trustee in bankruptcy has acquired a vested title (*Ex parte Furber, In re Parsons* [1893], 2 Q. B. 122).

When a bill of sale is satisfied, the registrar may order a memorandum of satisfaction to be written upon the registered copy (Act of 1878, s. 15; R. S. C., 1883, Order 61, rr. 26, 27; *White to Rubery* [1894], 2 Q. B. 923).

Provision is also made for the local registration of the contents of bills of sale when the grantor resides, or the bill of sale or schedule describes the chattels as being, outside the London Bankruptcy district (Act of 1882, s. 11; Rules of the Supreme Court, Bills of Sale Acts, 1878 and 1882, rr. 3-11). The registrar transmits to the County Court registrar an abstract of the contents of the bill of sale, or of the re-registration of a bill of sale. Such abstracts are numbered, filed, and indexed by the County Court registrar. The registrar also transmits notice of satisfaction of a bill of sale which is to be noted in the index. Any person may search the index of abstracts and make extracts or obtain office copies. The omission of the registrar to transmit an abstract does not avoid the bill of sale, even as against an execution creditor who has searched the local register (*Trinder v. Raynor*, 1887, 56 L. J. Q. B. 422).

### I. ABSOLUTE BILLS OF SALE.

Absolute bills of sale are governed by the Act of 1878. That Act does not impose any restrictions as to the form or the operation of a bill of sale; it assumes that the instrument gives a valid title to the chattels; but in certain events and in favour of certain persons the Act avoids the title if its requirements as to attestation, registration, and statement of consideration have not been complied with. For this purpose bills of sale in security for money dated prior to 1st November 1882 are classed with absolute bills of sale (*Ex parte Izard, In re Chapple*, 1883, 23 Ch. D. 409; *Hickson v. Darlow*, 1883, 23 Ch. D. 690); but the power of the grantee to remove or sell the chattels after possession has been taken is cut down by sec. 13 of the Act of 1882, and by the proviso to sec. 7 of that Act, which are retrospective (*Ex parte Cotton*, 1883, 11 Q. B. D. 301). Absolute bills of sale include not only documents accompanying sales, but also deeds of gift, settlements, especially postnuptial settlements, and absolute declarations of trust without transfer. In the case of a bill of sale by the sheriff, the description of residence and occupation in the affidavit, and the question of possession or apparent possession under the Act, apply to the person whose goods are sold under process of execution.

The execution of these bills of sale must be attested by a solicitor of the Supreme Court, and the attestation clause must state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor (Act of 1878, s. 10 (1); *Casson v. Churchley*, 1884, 53 L. J. Q. B. 335). The solicitor for the grantee is competent to attest the execution (*Penwarden v. Roberts*, 1882, 9 Q. B. D. 137); but if the grantee

is himself a solicitor, attestation by him is not sufficient (*Seal v. Claridge*, 1881, 7 Q. B. D. 516).

It is not necessary that an absolute bill of sale should have a schedule containing a specific description of the chattels. But a schedule is generally added for purposes of identification. If a schedule or inventory is annexed to, or referred to in, a bill of sale, it must be presented to the registrar along with the bill of sale and a copy filed. As to the relation between the schedule and the operative words of assignment in the bill of sale, see *Ex parte Jardine*, *In re M'Manus*, 1875, L. R. 10 Ch. 322; *Wood v. Rowcliffe*, 1851, 20 L. J. Ex. 285; *Baker v. Richardson*, 1858, 6 W. R. 663; *In re Royal Marine Hotel Co.*, 1895, 1 Ir. L. 368.

The only persons in whose favour sec. 8 of the Act of 1878 avoids a bill of sale are—(1) trustees or assignees of the estate of the grantor under the law relating to bankruptcy or liquidation; (2) trustees or assignees under any assignment for the benefit of creditors (see *Paine v. Matthews*, 1885, 53 L. T. 872); (3) sheriff's-officers and other persons seizing the chattels in the execution of process of Court; and (4) every person on whose behalf such process shall have been issued. An unregistered bill of sale is good as between grantor and grantee (*Davis v. Goodman*, 1880, 5 C. P. D. 128), as against unsecured creditors of the deceased grantor in an administration action (*In re Knott*, 1877, 7 Ch. D. 549 n.; *In re D'Epineuil*, 1882, 20 Ch. D. 217), and as against a purchaser from the grantor not in the ordinary course of business (*Taylor v. M'Keand*, 1880, 5 C. P. D. 358). An absolute bill of sale by an incorporated company is not void for non-registration as against the liquidator of the company (*In re Marine Mansions Co.*, 1867, L. R. 4 Eq. 601; *In re Asphaltic Wood Pavement Co.*, 1883, 49 L. T. 159; *In re Royal Marine Hotel Co.*, 1895, 1 Ir. L. 368). In the case of an execution creditor, the Act only avoids the bill of sale to the extent necessary to give effect to the execution (*Ex parte Blaiberg*, *In re Toomer*, 1883, 23 Ch. D. 254); but it is immaterial that the execution creditor had notice of the bill of sale before giving credit to the grantor (*Edwards v. Edwards*, 1876, 2 Ch. D. 291).

The critical date when the Act operates to avoid the title is "at or after the time of filing the petition for bankruptcy or liquidation" (not "at the commencement of the bankruptcy," as under the Act of 1854), "or of the execution of such assignment, or of executing such process (as the case may be), and after the expiration of such seven days," i.e. the seven days allowed for registration. If an execution is levied within the seven days the bill of sale is not avoided (*Marples v. Hartley*, 1861, 30 L. J. Q. B. 92; *Banbury v. White*, 1863, 32 L. J. Ex. 258; *Brignall v. Cohen*, 1872, 21 W. R. 25); nor does the reputed ownership section apply during the seven days (*Ex parte Kahen*, *In re Hewer*, 1882, 21 Ch. D. 871).

The avoidance under the Act is limited to "the property in or right to the possession of any chattels comprised in the bill of sale which" at the critical date "are in the possession or apparent possession" of the grantor. Chattels are deemed to be in the apparent possession of the grantor "so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person" (s. 4). The occupation intended by this definition is an actual occupation *de facto* (*Robinson v. Briggs*, 1870, L. R. 6 Ex. 1). A merely formal taking of possession leaves the chattels in the grantor's possession or apparent possession (*Ex parte Lewis*, *In re Henderson*, 1871, L. R. 6 Ch. 626; *Seal v. Claridge*, 1881, 7 Q. B. D. 516); but when enough is done to make the

change of possession manifest, his apparent possession is at an end (*Smith v. Wall*, 1868, 18 L. T. 182; *Emanuel v. Bridges*, 1874, L. R. 9 Q. B. 286; *Ex parte Jay*, *In re Blenkhorn*, 1874, L. R. 9 Ch. 697; *Robinson v. Tucker*, 1883, C. & E. 173). The same rule applies where the grantor continues to occupy the premises, but only as servant to the grantee (*Pickard v. Marriage*, 1876, 1 Ex. D. 364; *Gibbons v. Hickson*, 1885, 53 L. T. 910). Many of the decisions relate to bills of sale in security for money, and are now of little use, since few such bills of sale dated prior to 1st November 1882 are in existence. Those which now exist are probably mortgages of land or buildings comprising chattels or trade machinery (see *Edwards v. Edwards*, 1876, 2 Ch. D. 291; *Ex parte Fletcher*, *In re Henley*, 1877, 5 Ch. D. 809; *Ex parte Morrison*, *In re Westray*, 1880, 42 L. T. 158). Chattels in the possession of a bailee for the grantor are in the grantor's apparent possession so long as he retains power of control or disposal (*Ancona v. Rogers*, 1876, 1 Ex. D. 285; *Ex parte Newsham*, *In re Wood*, 1879, 40 L. T. 104), but not if the bailee has attorned to the title of the grantee or holds the chattels under a demise (*Ex parte Morrison*, *In re Westray*, 1880, 42 L. T. 158), or under a claim of lien (*Lincoln Wagon Co. v. Mumford*, 1879, 41 L. T. 655). As to chattels in the possession of the sheriff under an execution, see *Ex parte Saffery*, *In re Brenner*, 1881, 16 Ch. D. 668. As to the question of possession or apparent possession as between husband and wife, or father and son, living in the same house, see *Swire v. Cookson*, 1883, 49 L. T. 736; *Shepherd v. Pulbrook*, 1888, 59 L. T. 288; *Ramsay v. Margrett* [1894], 2 Q. B. 18; *In re Satterthwaite*, 1895, 2 Manson, 52.

If an absolute bill of sale has been and continues to be duly registered, the chattels comprised in it shall not be deemed to be in the possession, order, or disposition of the grantor within the meaning of the Bankruptcy Act (Act of 1878, s. 20). If it is not registered, the trustee may be able to take advantage of the reputed ownership section in preference to sec. 8 of the Bills of Sale Act, 1878; the critical date for this purpose is the "commencement of the bankruptcy." On the other hand, the reputed ownership section is ousted by an attempt to obtain possession, which would not be sufficient to exclude the grantor's apparent possession (see *Ancona v. Rogers*, 1876, 1 Ex. D. 285; *Ex parte Fletcher*, *In re Henley*, 1877, 5 Ch. D. 809).

## II. BILLS OF SALE IN SECURITY FOR MONEY.

Bills of sale given by way of security for the payment of money on or after 1st November 1882 are governed by the Act of 1882.

*Bills of Sale "in Security for the Payment of Money."*—Whether a bill of sale is given by way of security for the payment of money or not is a question of fact; and parol evidence is admissible to prove the real nature of the transaction (*Ex parte Official Receiver*, *In re Watson*, 1890, 25 Q. B. D. 27; *Madell v. Thomas* [1891], 1 Q. B. 230; *Beckett v. Tower Assets Co.* [1891], 1 Q. B. 638; *Ex parte Finlay*, *In re Linton* [1893], 10 Morrell, 258). Another form of stating the question is whether the bill of sale was made or given subject to a defeasance, or condition, or declaration of trust (Act of 1878, s. 10, *ante*, p. 135). Thus, an absolute bill of sale may be converted into a mortgage by a contemporaneous hiring agreement, if the real intention is to secure a loan (*Ex parte Odell*, *In re Walden*, 1878, 10 Ch. D. 78). A declaration of trust within this section must be one by which the holder is bound in favour of the grantor (*Robinson v. Collingwood*, 1864, 34 L. J. C. P. 18; *Thomas v. Searles* [1891], 2 Q. B. 408); but it has been held by the Court of Appeal that any condition, whether in favour of the grantor or of the grantee, is within the section (*Edwards v. Marcus* [1894], 1 Q. B. 587; see

Weir on *Bills of Sale*, pp. 221–224). A prior parol agreement varying the terms of redemption contained in a bill of sale in security for money will avoid the registration (*Ex parte Southam, In re Southam*, 1874, L. R. 17 Eq. 578), but not a memorandum which merely explains and does not alter them (*Ex parte Collins, In re Lees*, 1875, L. R. 10 Ch. 367), nor a mere collateral agreement (*Ex parte Popplewell, In re Storey*, 1882, 21 Ch. D. 73), nor an agreement subsequent to and distinct from the transaction (*Linfoot v. Pockett* [1895], 2 Ch. 835). The deposit of a policy of insurance as collateral security is not a defeasance or condition of the bill of sale (*Carpenter v. Deen*, 1889, 23 Q. B. D. 566); but if a collateral security, such as a promissory note, provides for payment of the same debt by the same instalments of principal and interest, but contains also a stipulation that in case of default in payment of any instalment the total amount of the unpaid instalments shall become due and payable, it will operate as a defeasance of the bill of sale (*Counsell v. London and Westminster Loan and Discount Co.*, 1887, 19 Q. B. D. 512). The promissory note, however, is not made void by the Act (*Monetary Advance Co. v. Cater*, 1888, 20 Q. B. D. 785; but see *Simpson v. Charing Cross Bank*, 1886, 34 W. R. 568). So, a contemporaneous agreement to pay compound interest on the debt will vitiate the registration (*Sharp v. Brown*, 1887, 38 Ch. D. 427; *Edwards v. Marcus* [1894], 1 Q. B. 587). An agreement that the grantee will exhaust other securities for the debt before resorting to the bill of sale is a mere collateral agreement (*Heseltine v. Simmons* [1892], 2 Q. B. 547).

*Consequence of Non-Registration.*—If a bill of sale is not duly registered, or does not truly set forth the consideration for which it was given, it is void, even between grantor and grantee, “in respect of the personal chattels comprised therein” (Act of 1882, s. 8). The grantor remains liable on the covenant for payment (*Davies v. Rees*, 1886, 17 Q. B. D. 408; *Heseltine v. Simmons* [1892], 2 Q. B. 547); but the grantee has no title to the chattels under the bill of sale even if he has taken possession (*Ex parte Parsons, In re Townsend*, 1886, 16 Q. B. D. 532). He may, however, acquire a title from the grantor by virtue of a separate and distinct transaction (*ibid.*; *Furber v. Cobb*, 1887, 18 Q. B. D. 494; *Parsons v. Dewsbury*, 1887, 3 T. L. R. 354; *Parker v. Lyon*, 1888, 5 T. L. R. 10). The necessity for registration cannot be evaded by giving a new bill of sale within the time limited for registration, for “if such subsequent bill of sale is given as a security for the same debt as is secured by the prior bill of sale, or for any part of such debt, it shall, to the extent to which it is a security for the same debt or part thereof, and so far as respects the personal chattels or part thereof comprised in the prior bill, be absolutely void, unless it is proved to the satisfaction of the Court having cognisance of the case that the subsequent bill of sale was *bonâ fide* given for the purpose of correcting some material error in the prior bill of sale, and not for the purpose of evading this Act” (Act of 1878, s. 9; see *Ex parte Hauxwell, In re Hemingway*, 1883, 23 Ch. D. 626).

*Statutory Form of Bill of Sale.*—By sec. 9 of the Act of 1882, “a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule” to the Act. This section avoids a bill of sale *in toto*, so that the grantee cannot even sue on the covenant for payment: he can only recover the money actually advanced, with interest at 5 per cent. on an implied agreement (*Davies v. Rees*, 1886, 17 Q. B. D. 408). But if an instrument includes a mortgage of realty, or of chattels real, or of a chose in action, and the security can be severed, it may be void as a bill of sale but good

as to the other property (*In re O'Dwyer*, 1886, 19 L. R. Ir. 19; *In re Bansha Woollen Mills Co.*, 1887, 21 L. R. Ir. 181; *Ex parte Byrne*, *In re Burdett*, 1888, 20 Q. B. D. 310; *Ex parte Mason*, *In re Isaacson* [1895], 1 Q. B. 333). A bill of sale is void under this section "when it departs from the statutory form in anything which is a characteristic of that form" (Lord Macnaghten, *Thomas v. Kelly*, 1888, 13 App. Cas. 506). This applies even to a formal defect which does not alter the legal effect of the deed (*Parsons v. Brand*, 1890, 25 Q. B. D. 110). As regards the effect of the contract, "a divergence only becomes substantial or material when it is calculated to give the bill of sale a legal consequence or effect, either greater or smaller, than that which would attach to it if drawn in the form which has been sanctioned, or if it departs from the form in a manner calculated to mislead those whom it is the object of the statute to protect" (*Ex parte Stanford*, *In re Barber*, 1886, 17 Q. B. D. 259; *Weardale Coal and Iron Co. v. Hodson* [1894], 1 Q. B. 598); but a bill of sale is not necessarily void because different Courts differ as to its true meaning (*Haslewood v. Consolidated Credit Co.*, 1820, 25 Q. B. D. 555).

The parties must be described in a way capable of ascertainment, or in such a way as would be sufficient without the aid of extrinsic evidence, in any mercantile document (*Simmons v. Woodward* [1892], App. Cas. 100). As to misnomer of the grantor, see *Lee v. Turner*, 1888, 20 Q. B. D. 773; *Downs v. Salmon*, 1888, 20 Q. B. D. 775; *Central Bank v. Hawkins*, 1890, 62 L. T. 901. As to the address of the grantor, see *Dolcini v. Dolcini* [1895], 1 Q. B. 898.

A bill of sale made or given in consideration of any sum under £30 is made void by sec. 12 (see *Darlow v. Bland* [1897], 1 Q. B. 125). An untrue statement of the consideration avoids the bill of sale under sec. 8, but not under sec. 9. Though the form contains no recitals, recitals which are not misleading and which superadd no legal obligation upon the grantor by way of estoppel or otherwise, do not vitiate the deed (*Ex parte Stanford*, *In re Barber*, 1886, 17 Q. B. D. 259).

The operative words of assignment must be strictly followed. The insertion of the words, "as beneficial owner," is not in accordance with the form (*Ex parte Stanford*, *In re Barber*, 1886, 17 Q. B. D. 259). The enlargement of the words to include future or after-acquired property is also fatal (*Thomas v. Kelly*, 1888, 13 App. Cas. 506), and so is an enlargement to include chattels real (*Cochrane v. Entwistle*, 1890, 25 Q. B. D. 116). The opinion seems, however, to have been expressed that words may be added to include chattels to be substituted either under a covenant for substitution or within the protection of sec. 6, subsec. 2 (*Hadden v. Oppenheim*, 1889, 60 L. T. 962; *Seed v. Bradley* [1894], 1 Q. B. 319). As to the assignment of chattels to several mortgagees to secure separate debts, see *Melville v. Stringer*, 1884, 13 Q. B. D. 392, and cp. *Ex parte Tarbuck*, *In re Smith*, 1894, 43 W. R. 206. The assignment is not an absolute assignment; it is restrained or qualified by the words "by way of security," etc., which form the condition of the bill of sale.

The condition must state a definite principal sum; for this reason a bill of sale, given by way of indemnity to a surety (*Hughes v. Little*, 1886, 18 Q. B. D. 32; *In re Hill*, *Official Receiver v. Ellis*, 1895, 2 Manson, 208), or to secure uncertain future advances (*Cook v. Taylor*, 1887, 3 T. L. R. 800), is void. The rate of interest must also be clearly stated: a provision for a lump sum as agreed capitalised interest (*Davis v. Burton*, 1883, 11 Q. B. D. 537), or as agreed bonus and interest (*Myers v. Elliott*, 1886, 16 Q. B. D. 526), is bad. But a stipulation for interest "at the rate of

one shilling in the pound per month," or any similar stipulation from which a person of ordinary intelligence can easily calculate the rate per cent. per annum, is good (*Lumley v. Simmons*, 1887, 34 Ch. D. 698). A bill of sale to secure the sum of £50, "and interest thereon at the rate of £17, 10s. for three years," the covenant providing for payment by thirty-six equal monthly instalments of £1, 17s. 6d., was held to be void, as not specifying any rate of interest (*Blankenstein v. Robertson*, 1890, 24 Q. B. D. 543). The condition in the form does not specify any time for payment; but the Courts appear to have read the covenant for payment, or the rest of the deed, as controlling the condition in this respect. For a criticism of this view, see a letter in the *Solicitors' Journal*, 13th February 1897, and a paragraph, *ibid.*, 20th February 1897.

The covenant for payment must name a stipulated time or times for payment. A covenant for payment on demand, or within a certain time after demand, is not in accordance with the form (*Hetherington v. Groome*, 1884, 13 Q. B. D. 789; *Sibley v. Higgs*, 1885, 15 Q. B. D. 619; *Furnivall v. Hudson* [1893], 1 Ch. 335); so a bill of sale given by way of indemnity to a surety is now void, the liability to pay being dependent on an uncertain contingency (*Hughes v. Little*, *supra*; *In re Hill*, *supra*). The principal sum may be made payable in one sum at a fixed date (*Watkins v. Evans*, 1887, 18 Q. B. D. 386); and it is permissible to provide, further, in case of the grantor, that if he does not break any of the covenants in the deed, the grantee will accept payment by stated monthly instalments (*Ex parte Payne*, *In re Cotton*, 1887, 56 L. T. 571). In a covenant for payment by instalments, the instalments may represent principal only (*Goldstrom v. Tallerman*, 1886, 18 Q. B. D. 1; *Ex parte Rawlings*, *In re Cleaver*, 1887, 18 Q. B. D. 489), or interest only (*Edwards v. Marston* [1891], 1 Q. B. 225), or principal and interest combined (*Simmons v. Woodward* [1892], App. Cas. 100; *Ex parte Haslack*, *In re Bergen* [1894], 1 Q. B. 444; *Linfoot v. Pockett* [1895], 2 Ch. 835). A clause may be added that "if default shall be made in any payment when it becomes due, the whole of the principal (or so much thereof as shall then remain unpaid), together with the interest then due, shall at once become payable" (*Lumley v. Simmons*, 1887, 34 Ch. D. 698); but a provision for accelerating future payments, including interest, would vitiate the bill of sale (*Davis v. Burton*, 1883, 11 Q. B. D. 537). Or a clause may be added that, "if default shall be made in payment of any of the said instalments of the principal sum, the same shall, until payment, continue to bear interest at the rate aforesaid" (*Haslewood v. Consolidated Credit Co.*, 1890, 25 Q. B. D. 555); but this applies only to the principal sum, or instalments thereof, for a stipulation for interest on interest vitiates a bill of sale (*Goldstrom v. Tallerman*, *supra*), and so does a stipulation for interest on principal which has already been repaid (*Weardale Coal and Iron Co. v. Hodson* [1894], 1 Q. B. 598).

The additional covenants which may be inserted must be carefully limited to terms "for the maintenance or defeasance of the security." If a term does not come reasonably within this description, and does alter the effect of the transaction, the bill of sale will be void (*Blaiberg v. Beckett*, 1886, 18 Q. B. D. 96; *Watson v. Strickland*, 1887, 19 Q. B. D. 391; *Peace v. Brookes* [1895], 2 Q. B. 451). A covenant is permissible to keep the chattels insured in a stated sum, and to produce the policies and receipts for premiums on demand (*Ex parte Stanford*, *In re Barber*, 1886, 17 Q. B. D. 259; *Watkins v. Evans*, 1887, 18 Q. B. D. 386). So is a covenant to pay rents, rates, and taxes (*Goldstrom v. Tallerman*, 1886, 18 Q. B. D. 1). It is also permissible to add a proviso that on default the grantee may make

such payments, and that sums so paid shall be charged on the chattels (*Ex parte Stanford, supra*; *Goldstrom v. Tallerman, supra*; *Briggs v. Pike*, 1892, 61 L. J. Q. B. 418); but if such sums are made recoverable by seizure, the bill of sale will be void (*Real and Personal Advance Co. v. Cleary*, 1888, 20 Q. B. D. 304). So there may be a covenant to produce receipts for rent, rates, and taxes on demand (*Weardale Coal and Iron Co. v. Hodson* [1894], 1 Q. B. 598; *Cartwright v. Regan* [1895], 1 Q. B. 900). Covenants may also be inserted not to remove the chattels from the premises, to replace articles worn out or deteriorated (*Topley v. Corsbie*, 1888, 20 Q. B. D. 350; *Seed v. Bradley* [1894], 1 Q. B. 319), or for further assurance (*Ex parte Rawlings, In re Cleaver*, 1887, 18 Q. B. D. 489). Powers may be inserted for the grantee to seize and sell (*Ex parte Official Receiver, In re Morrish*, 1886, 18 Q. B. D. 222; *Lumley v. Simmons*, 1887, 34 Ch. D. 698), and declaring trusts of the proceeds (*Ex parte Rawlings, In re Cleaver, supra*), so long as such powers or trusts do not contravene the provisions of the Act, or alter the legal rights of the parties (*Blairberg v. Beckett*, 1886, 18 Q. B. D. 96; *Furber v. Cobb*, 1887, 18 Q. B. D. 494; *Lyon v. Morris*, 1887, 19 Q. B. D. 139; *Calvert v. Thomas*, 1887, 19 Q. B. D. 204).

If a power of seizure is attached to any covenant which is not "necessary for maintaining the security," the bill of sale is void, as contravening the provisions of sec. 7. The decisions on this point are somewhat obscure, and are too numerous to summarise here. See Weir on *Bills of Sale*, pp. 304-308; and particularly *Furber v. Cobb*, 1887, 18 Q. B. D. 494; *Barr v. Kingsford*, 1887, 56 L. T. 861; *Gilroy v. Bovey*, 1888, 59 L. T. 223.

The proviso entitling the grantor to retain possession until default incorporates by reference the terms of sec. 7 of the Act; see *post*, p. 144.

The bill of sale must be attested "by one or more credible witness or witnesses, not being a party or parties thereto" (s. 10). There is nothing in the Act to prevent an agent of the grantee from being an attesting witness (*Peace v. Brookes* [1895], 2 Q. B. 451). If the address or description of any attesting witness is not stated, the bill of sale is void; the omission cannot be supplied by reference to the affidavit (*Blankenstein v. Robertson*, 1890, 24 Q. B. D. 543; *Parsons v. Brand*, 1890, 25 Q. B. D. 110). If a witness has no occupation, the fact should be stated, or some description of "addition" given; for it has been held that "address and description" are to be contra-distinguished from "description of residence and occupation" as used in sec. 10 of the Act of 1878 (*Sims v. Trollope* [1897], 1 Q. B. 24). As to what is a sufficient "address," see *Hickley v. Greenwood*, 1890, 63 L. T. 288; *Simmons v. Woodward* [1892], App. Cas. 100. When a bill of sale had two attestation clauses signed by the same witness, attesting the execution by different grantors, and only one clause contained the address and description of the witness, the bill of sale was upheld, there being an irresistible inference on the face of the deed that the witness signing the two clauses was the same person (*Bird v. Davey* [1891], 1 Q. B. 29).

*The Schedule to the Bill of Sale.*—It is a characteristic of the statutory form that "in the body of the instrument there is no substantive description of the things intended to be assigned" (Lord Macnaghten, *Thomas v. Kelly*, 1888, 13 App. Cas. 506). The schedule, therefore, interprets and supplements the operative words of assignment in the body of the bill of sale: "the several chattels and things specifically described in the schedule hereto annexed." But the Act contains two important provisions avoiding a bill of sale, "except as against the grantor," in respect of (1) personal chattels not specifically described in the schedule; and (2) personal chattels

specifically described therein of which the grantor was not the true owner at the date of the deed.

Sec. 4 provides that "Every bill of sale shall have annexed thereto, or written thereon, a schedule containing an inventory of the personal chattels comprised in the bill of sale; and such bill of sale, save as hereinafter mentioned" (*i.e.* in sec. 6), "shall have effect only in respect of the personal chattels specifically described in the said schedule; and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described." If there is no schedule when the bill of sale is executed, the deed is void as not being in accordance with the statutory form (*Griffin v. Union Deposit Bank*, 1887, 3 T. L. R. 608). The chattels "are to be as specifically described as is usual in such inventories as are usually made for business purposes with regard to the particular subject-matter" (Lord Esher, M. R., *Witt v. Banner*, 1887, 20 Q. B. D. 114). The description "household furniture and effects" is insufficient (*Roberts v. Roberts*, 1884, 13 Q. B. D. 794). So is the description "450 oil paintings in gilt frames, 300 oil paintings unframed," in a bill of sale by a picture dealer (*Witt v. Banner*, *supra*), or the description "21 milch cows" in a bill of sale by a farmer (*Carpenter v. Deen*, 1889, 23 Q. B. D. 566). But the following descriptions have been held sufficiently specific:—"12 oil paintings in gilt frames" in a particular room of a dwelling-house (*Cooper v. Huggins*, 1889, 34 Sol. J. 96), "all my farming stock, comprising 4 horses, 5 cows," etc. (*Jones v. Roberts*, 1890, 34 Sol. J. 254), and (in the study of a vicarage) "1800 volumes of books, as per catalogue" (*Davidson v. Carlton Bank* [1893], 1 Q. B. 82). Such a description as "roan horse 'Drummer,' brown mare and foal, three rade carts," is not necessarily insufficient, though there may be evidence to show that the chattels cannot be identified (*Hickley v. Greenwood*, 1890, 25 Q. B. D. 277). It is not necessary that the schedule should specify the house or place where the chattels are situated (*Ex parte Hill*, *In re Lane*, 1886, 17 Q. B. D. 74).

By sec. 5, "Save as hereinafter mentioned" (*i.e.* in sec. 6), "a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto, of which the grantor was not the true owner at the time of the execution of the bill of sale." This enactment is not restricted to after-acquired property; it extends to a case where the grantor has already assigned away the property absolutely (*Tuck v. Southern Counties Deposit Bank*, 1889, 42 Ch. D. 471), or where an undivided moiety of the goods belongs to another (*Ex parte Barnett*, *In re Tamplin*, 1890, 62 L. T. 264). But the words "true owner" are satisfied by either legal or equitable ownership, *e.g.* by the equity of redemption upon a prior bill of sale by way of security (*Thomas v. Searles* [1891], 2 Q. B. 408), or an equitable interest under a settlement (*Ex parte Pratt*, *In re Feild*, 1890, 63 L. T. 289), or the legal ownership of a trustee (*Ex parte Williams*, *In re Sarl* [1892], 2 Q. B. 591).

By sec. 6, "nothing contained in the foregoing sections of this Act" (in secs. 4 and 5) "shall render a bill of sale void in respect of any of the following things: (that is to say), (1) Any growing crops separately assigned or charged where such crops were actually growing at the time when the bill of sale was executed; (2) any fixtures separately assigned or charged, and any plant or trade machinery, where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to such bill of sale." As to this enactment, see *Tennant v. Howatson*, 1888, 13



App. Cas. 489; Lord Macnaghten, *Thomas v. Kelly*, 1888, 13 App. Cas. 506; *Seed v. Bradley* [1894], 1 Q. B. 319. The word "plant" includes moveables, but only such as are capable of local substitution, and similar in nature to fixtures or trade machinery—an application of the maxim *noscitur a sociis* (*London and Eastern Counties Loan Co. v. Creasey* [1897], 1 Q. B. 442).

*Grantee's Right to Seize and Sell.*—The right of the grantee to seize, remove, or sell the chattels under the bill of sale is restricted by secs. 7 and 13 of the Act.

By sec. 7, "personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:—(1) If the grantor shall make default (see *Williams v. Stern*, 1879, 5 Q. B. D. 409) in payment of the sum or sums of money thereby secured at the time or times therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale, and necessary for maintaining the security; (2) if the grantor shall become a bankrupt (this does not include effecting a statutory composition with creditors—*Gilroy v. Bowey*, 1888, 59 L. T. 223), or suffer the said goods, or any of them, to be distrained for rent, rates, or taxes; (3) if the grantor shall fraudulently either remove or suffer the said goods, or any of them, to be removed from the premises; (4) if the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes; (5) if execution shall have been levied against the goods of the grantor under any judgment at law."

By sec. 13 it is enacted that, after possession has been taken, the chattels "shall remain on the premises where they were so seized, or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or so taken possession of." As to seizure of chattels (a horse and carriage) in a public street, see *O'Neil v. City and County Finance Co.*, 1886, 17 Q. B. D. 234. This section is for the benefit of the grantor only; if he consents to the earlier removal of the chattels, the landlord of the premises has no claim against the grantee for loss of rent (*Lane v. Tyler*, 1887, 56 L. J. Q. B. 461), or for double value of the goods so removed (*Tomlinson v. Consolidated Credit Corporation*, 1889, 24 Q. B. D. 135).

The proviso to sec. 7 is as follows: "Provided that the grantor may within five days from the seizure or taking possession of any chattels on account of any of the above-mentioned causes, apply to the High Court, or to a judge thereof in Chambers, and such Court or judge, if satisfied that by payment of money or otherwise the said cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just." If the chattels have been seized on failure to pay an instalment, an offer by the grantor to pay the money may be sufficient to satisfy the judge that the cause of seizure has ceased to exist (*Ex parte Cotton*, 1883, 11 Q. B. D. 301). If the grantor becomes bankrupt after seizure, the trustee in bankruptcy can only redeem by paying the whole amount owing on the security (*Ex parte Woolfe, In re Wood* [1894], 1 Q. B. 605). The provisions of the Conveyancing Act, 1881, as to a mortgagee's power of sale, are not incorporated by the statutory form; but if the deed contains no express power, the grantee has an implied power of seizure and sale by virtue of secs. 7 and 13 of the Act of 1882 (see *Ex parte Official Receiver, In re Morrill*, 1887, 18 Q. B. D. 222; *Calvert v. Thomas*, 1887, 19 Q. B. D. 204).

*Rights of Grantor.*—The right of the grantor to retain possession of the

chattels is defined by sec. 7 (*ante*, p. 144). This section has the effect of a redemise to the grantor until one of the specified events has happened. "If that right is interfered with by the grantee, he would be liable to an action for trespass, or to an action on the deed, in which the damages would be the same as in the other action, or, in case the deed did not contain the stipulations, an action on the statute, which would have the same effect" (Bowen, L. J., *Johnson v. Diprose* [1893], 1 Q. B. 512). The grantor, however, has no *jus disponendi*, and if he sells the chattels the grantee may recover possession of them from the purchaser, or may sue the purchaser for damages for conversion (*Edwards v. Marston* [1891], 1 Q. B. 225). As to the liability of an auctioneer who sells the goods on behalf of the grantor, see *Cochrane v. Rymill*, 1879, 40 L. T. 744; *Consolidated Co. v. Curtis* [1892], 1 Q. B. 495; *National Mercantile Bank v. Rymill*, 1881, 44 L. T. 767. The grantor may be criminally liable for obtaining money by false pretences from a purchaser of the chattels (*R. v. Sampson*, 1885, 52 L. T. 772), or from a person advancing money on a second bill of sale on the faith of a representation that the chattels are unencumbered (*R. v. Meakin*, 1869, 11 Cox C. C. 270). As to the grantor's right of redemption, see *Johnson v. Diprose* [1893], 1 Q. B. 512; *Solicitors' Journal*, 13th February 1897. As to setting aside a bill of sale obtained by misrepresentation, or by a trick, see *Moorhouse v. Woolfe*, 1882, 46 L. T. 374; *Bouchette v. Consolidated Credit Corporation*, 1889, 5 T. L. R. 653.

*Rights of Grantor's Creditors.*—The rights of creditors of the grantor are more extensive than those of the grantor himself. They may not only take advantage of a defect in form or of a flaw in the registration: they may also challenge the specific description of the chattels in the schedule, or the true ownership of the grantor at the date of the deed. Further, the bill of sale is no protection against distress under a warrant for the recovery of taxes or poor or other parochial rates (s. 14), though it does protect them from liability to execution under a judgment for rates (*Wimbledon Local Board v. Underwood* [1892], 1 Q. B. 836). As regards the application of the reputed ownership section of the Bankruptcy Act, there has been a conflict of opinion. Sec. 20 of the Act of 1878 was repealed, as regards bills of sale in security for money, by sec. 15 of the Act of 1882, so that the mere fact of registration no longer prevents the application of the section. But the question remains as to the effect of sec. 7 of the Act. In the Irish Bankruptcy Court, Miller, J., held that, as the grantee is now prohibited by the statute from taking possession of the chattels, except in certain specified events, the reputed ownership section cannot apply until one of the events has happened (*In re Stanley*, 1886, 17 L. R. Ir. 487). This decision was apparently disapproved by Cave, J. (*Ex parte Slater, In re Webber*, 1891, 64 L. T. 426); and in a County Court case Sir A. Marten has recently held that sec. 7 does not prevent the application of the reputed ownership section (*Ex parte London Universal Bank Ltd., In re Ginger*, 1896, L. T. J. vol. ci. p. 609). The divergence of opinion is perhaps as much one of morals as of law, viz., whether the reputed ownership section is a penal section, intended to strike at "unconscientious" dealings. If so, the Legislature cannot both approbate and reprobate: it cannot punish the grantee for leaving the grantor in possession, when it has expressly prohibited him from doing otherwise.

### III. INSTRUMENTS "DEEMED TO BE BILLS OF SALE."

It remains to notice the two classes of instruments which are not within the definition of a bill of sale in sec. 4 of the Act of 1878, but are

"deemed to be bills of sale" within secs. 5 and 6 respectively of that Act. The distinction was unimportant until the passing of the Act of 1882, and was not brought into prominence before the decision of the Court of Appeal in *Green v. Marsh* [1892], 2 Q. B. 330. Instruments within sec. 6 were not within the Act of 1854 at all; and that section was a new enactment extending the operation of the Acts. Instruments within sec. 5 were within the Act of 1854; and that section is a survival, as regards "trade machinery," of principles which under the Act of 1854 applied to fixtures generally.

By sec. 5, "trade machinery" is defined to mean "the machinery used in or attached to any factory or workshop," exclusive of fixed motive powers, fixed power machinery, and pipes for steam, gas, and water; and it is enacted that "trade machinery shall, for the purposes of this Act, be deemed to be personal chattels, and any mode of disposition of trade machinery by the owner thereof which would be a bill of sale as to any other personal chattels shall be deemed to be a bill of sale within the meaning of this Act." The term "factory or workshop" is also defined. And it is further enacted that "the machinery or effects excluded by this section from the definition of trade machinery shall not be deemed to be personal chattels within the meaning of this Act." It has been held that the "excluded machinery" is not within the Acts for any purpose, even when assigned or charged separately from the land (*Topham v. Greenside Firebrick Co.*, 1887, 37 Ch. D. 281; cp. *Ex parte Byrne, In re Burdett*, 1888, 20 Q. B. D. 310); and even as regards "trade machinery" the relation between sec. 4 and sec. 5 has never been judicially examined (see Weir on *Bills of Sale*, pp. 165, 173 *et seq.*). There are, however, several decisions under the Act as to trade machinery comprised in a conveyance of land.

"Where there is a mere conveyance of land, which conveyance by itself gives the mortgagee a right to all the fixtures upon it, including the trade machinery, that is not to be considered as an assurance of personal chattels so as to come within the Act" (Cotton, L. J., *In re Yates, Batcheldor v. Yates*, 1888, 38 Ch. D. 112). This rule applies to a mortgage in fee of land and buildings, without any general words or any reference to fixtures or machinery (*In re Yates, supra*), to an equitable mortgage by deposit of the deeds of leasehold premises containing trade machinery (*Ex parte Lusty, In re Lusty*, 1889, 60 L. T. 160), or to a mortgage which expressly mentions fixed machinery and fixtures, but does not give the mortgagee any larger right than if the machinery and fixtures had passed without express mention as part of the land (*In re Brooke, Brooke v. Brooke* [1894], 2 Ch. 600). But if a mortgage expressly mentions fixed trade machinery along with loose chattels, and is intended to give the grantees a right to the fixed machinery in addition to any right which they would have simply as grantees of the land, it will be deemed to be a bill of sale within the section (*Small v. National Provincial Bank of England* [1894], 1 Ch. 686).

The general scope of sec. 6 is considered in the article on ATTORNMENT (*ante*, vol. i.). The exception of a mining lease applies to a *bona fide* mining lease in an ordinary form, even though it enables the lessor to distrain for the rent on other mines not comprised in the lease, but worked in connection with the mines demised (*In re Roundwood Colliery Co.* [1897], 1 Ch. 373). A mining lease, however, which contained extraordinary powers of distress would not be within the exception, but might come within sec. 6 or within sec. 4 as a licence to take possession of chattels as security for a debt (*ibid.*). It was at one time supposed that instruments within this section were void under sec. 9 of the Act of 1882, as not being in accordance with

the statutory form (*Mumford v. Collier*, 1890, 25 Q. B. D. 279). It has, however, been held by the Court of Appeal that such an instrument, if unregistered, is void under sec. 8 of that Act, but that "not being actually a bill of sale, it need not be according to the scheduled form, because sec. 9 does not apply to it" (*Green v. Marsh* [1892], 2 Q. B. 330). This decision is based on the phrase that the instrument is not a bill of sale, but is only to be deemed to be a bill of sale. The Court do not seem to have noticed that the same reasoning would apply to dispositions of trade machinery under sec. 5 of the Act of 1878, which are given by way of security for money. Nor did the Court refer to the language of sec. 3 of the Act of 1882, which defines the application of that Act. It has since been suggested that on the true construction of that section the Act of 1882 does not apply at all to instruments which are deemed to be bills of sale within secs. 5 and 6 of the Act of 1878, and therefore that these instruments remain on the same footing as absolute bills of sale (see Weir on *Bills of Sale*, pp. 174, 246-248).

[See Reed, *Bills of Sale Acts*, 10th ed., 1895; Weir on *Bills of Sale*, 1896; Lyon and Redman, *Bills of Sale*, 4th ed., 1896; Robson on *Bankruptcy*; Baldwin on *Bankruptcy and Bills of Sale*; Yate-Lee and Wace on *Bankruptcy and Bills of Sale*, 3rd ed., 1891. Reference may also be made to the standard works on Conveyancing.]

**Bills (Sticking).**—1. The sticking of a bill or advertisement on the property of another, without his consent, is an actionable trespass. So is pasting a bill over that of a rival bill-sticker, except in exercise of a paramount and lawful right.

2. Bill-sticking is not summarily punishable outside the Metropolitan Police District by any general Act, but is the subject of special provisions in many local Acts affecting particular districts. In the Metropolitan Police District it is an offence, punishable on summary conviction by a penalty not exceeding 40s., in any thoroughfare or public place to affix, without the consent of the owner or occupier, any posting bill or other paper upon or against any building, wall, fence, or gate, or to write upon, soil, deface, or mark such wall, etc., with chalk or paint, or in any other way whatever. A constable may arrest without warrant any person who commits the offence in his view (2 & 3 Vict. c. 47, s. 54 (10)).

3. The sticking or exhibition of indecent bills, etc., is prohibited by the Indecent Advertisements Act, 1889 (52 & 53 Vict. c. 18), which expressly includes bills about venereal diseases. See INDECENCY.

4. The privilege being of value, controversy at times arises between the contractor and the building owner as to who is entitled to advertise on hoardings round a building in course of erection or demolition. Its settlement depends on whether the terms of the contract vest the hoarding in the contractor or building owner (see *Chappell v. St. Botolph Overseers* [1892], 1 Q. B. 561, 565). Where hoardings, etc., are temporarily erected under the licence of a local authority over any part of a public highway, or any property of the local authority, the authority may insert in the licence a condition prohibiting advertisements on the hoarding, etc., or permitting it on terms of paying such sum and complying with such other conditions as the licensing authority think fit (52 & 53 Vict. c. 27, s. 5). In London the vestries and district boards are the licensing authority (57 Geo. III. cxxix. s. 75; 18 & 19 Vict. c. 120, ss. 122, 123; 53 & 54 Vict. c. cxliiii. s. 32). Outside London the authority is the borough council, or urban, or rural district council.

5. The rating of bill-stickers' stations on land not otherwise occupied is regulated by the Advertising Stations Rating Act, 1889 (52 & 53 Vict. c. 27). Prior to the Act it had been held that advertising agents could not be rated as occupiers of a wall on which they pasted bills by license of the owner (*R. v. St. Pancras*, 1876, 2 Q. B. D. 581); under the Act advertising stations can now be rated; but the person who licenses their use of a wall or hoarding is made liable, and not the advertising agent (*Chappell v. St. Botolph Overseers* [1892], 1 Q. B. 561).

**Bind over.**—This term is correlative to “bond,” but is used as a legal term only with reference to certain kinds of recognisances or bonds. A person is said to be “bound over” when he enters into a bond or recognisance to the Crown to do or abstain from some act. 1. On committal for trial for an indictable offence the defendant, if bailed, is bound over to appear and take his trial, and the prosecutor and the witnesses on either side (except witnesses to character) are bound over to appear and prosecute or give evidence, as the case may be (11 & 12 Vict. c. 42, ss. 20, 25, 26; 30 & 31 Vict. c. 35, s. 3). A defendant to articles of the peace (*q.v.*) or to any charge of misdemeanour may be bound over to keep the peace and to be of good behaviour; and the same power exists by statute as to felonies (except murder) included in any of the Criminal Law Consolidation Acts of 1861 (24 & 25 Vict. c. 96, s. 117; c. 97, s. 73; c. 98, s. 51; c. 99, s. 38; c. 100, s. 71): and in the case of a first conviction for any offence included in the Probation of First Offenders Act, 1887, 50 & 51 Vict. c. 25. See BAIL; SURETIES.

2. On a prosecution for an offence punishable on summary conviction, the power of binding over the defendant during any adjournment or in lieu of other punishment exists as in indictable cases (11 & 12 Vict. c. 43, s. 16; 42 & 43 Vict. c. 49, s. 4).

**Birds.**—From a legal point of view birds fall into two classes—(a) *domestic*, i.e. birds kept whether in confinement or not for purposes of food or profit; (b) *wild birds*, birds *feræ naturæ*.

(a) *Domestic Birds.*—Birds of this class, their eggs and young, are the subject of larceny at common law. The class originally included fowls, tame ducks and geese, and pigeons, if shut up in or regularly resorting to a dove cot (*R. v. Cheafor*, 1851, 2 Den. 361), and the term is also extended to turkeys, peacocks, and guinea-fowl, and to pheasants and partridges, tamed or kept in a pen (*R. v. Head*, 1857, 1 F. & F. 350; *R. v. Gallcars*, 1839, 19 L. J. M. C. 13), and all birds wild by nature when alive and reclaimed or confined. The stealing of house pigeons is not larceny at common law in every case; where it is not, the thief is punishable on summary conviction under sec. 27 of the Larceny Act, 1861, 24 & 25 Vict. c. 96.

Under sec. 21 of the Larceny Act, 1861, stealing or taking, with intent to steal, any bird ordinarily kept in a state of confinement or for a domestic purpose, is punishable on summary conviction, with an increased penalty for a second or subsequent offence under sec. 22. If any such bird or its plumage is found in the possession of any person, a Court of summary jurisdiction may order its restoration to the owner, and persons who are found in such possession with knowledge that the bird was stolen or the plumage that of a stolen bird, are liable on conviction to the same penalties as under sec. 21.

Under **sec. 41** of the Malicious Damage Act, 1861, 24 & 25 Vict. c. 21, unlawfully and maliciously taking, maiming, or wounding any bird ordinarily kept in confinement or for any domestic purpose, is punishable on summary conviction, and with an increased penalty for a second or subsequent offence.

A man does not incur the penalties of these Acts who kills trespassing fowls or pigeons (otherwise than by poison) in defence of his crops or property (*Taylor v. Newman*, 1863, 32 L. J. M. C. 186; *Smith v. Williams*, 1892, 9 T. L. R. 9; *Daniel v. James*, 1877, 2 C. P. D. 351), and the person injured by the incursions of other people's domestic fowls may either distrain them damage feasant (*q.v.*) if he can catch them or sue for the injury done by them. Domestic birds in the ordinary sense are within the protection of the Prevention of Cruelty to Animals Acts, 17 & 18 Vict. c. 60, s. 3 (*Murphy v. Manning*, 1877, 2 Ex. D. 307). See ANIMALS.

The keeping of birds in such a manner as to be a nuisance or injurious to health is summarily punishable under the Public Health Acts, 38 & 39 Vict. c. 55, s. 91 (2); 54 & 55 Vict. c. 76, s. 2 (1) (c), but these provisions do not apply to nuisances created by noise only, such as early cock-crowing, which can be abated only by indictment or action.

Laying poisoned grain or flesh to kill birds, domestic or other, is punishable (26 & 27 Vict. c. 113; 27 & 28 Vict. c. 115), unless, in the case of grain, it is *bona fide* poisoned for an agricultural purpose or to kill vermin, *i.e.* insects, and mice and the like.

(b) *Wild Birds*.—These fall into three classes—(1) royal birds: (2) game birds; (3) the rest.

(1) The swan is regarded as *feræ naturæ*, but as a royal bird. Swans may be reduced into possession by private persons, and kept on their private waters. If so reduced into possession, they are the subject of larceny at common law (*Archb. Cr. Pl.*, 21st ed., 371). But all swans found in navigable rivers (*q.v.*) or the sea may be seized for the use of the sovereign.

The right to private possession of swans found on public waters is recognised only where the alleged owner can show that the swan is marked with a swan mark which is his by royal grant or prescription (see 22 Edw. IV. c. 6, and the case of *Swans*, 1592, 7 Co. Rep. 16, where all the old learning on the subject is collected).

The swans on the river Thames for the most part belong to the Crown, but some are the property of certain city guilds under royal grants, etc.; and annually the process of swan hopping or swan upping is gone through for the purpose of marking the young of the swans of the several owners.

A swan is not a game bird in the eye of the law. Swans' eggs are not the subject of larceny at common law (2 Russ. on *Crimes*, 6th ed., 247), but their taking was punishable by statute (11 Hen. VII. c. 17); and persons taking them on land on which they have not the right to kill game, or found in possession of eggs so taken, are liable to summary conviction under sec. 24 of the Game Act, 1831, 1 & 2 Will. IV. c. 32, which Act repealed those of Edward IV. and Henry VII.

(2) As to game birds, see GAME LAWS.

(3) Wild birds not falling within classes (1) and (2) stand in a different position in law. Hawks kept for sport are in an exceptional position. They are said to have been treated at common law as domestic animals and the subject of larceny (1 Hawk., P. C., bk. 1, c. 33, s. 36). But their position seems to have rested on the 34 Edw. III. c. 22, and 37 Edw. III. c. 19, both now repealed. The same rule has been extended to young pheasants or

partridges hatched and reared under a domestic hen (*R. v. Shickle*, 1868, L. R. 1 C. C. R. 158; *R. v. Cory*, 1864, 10 Cox C. C. 23).

In other cases there is no right of property in any wild bird unless it is killed (or caught) and reduced into possession. Rooks even in a rookery are not subjects of larceny. In fact, under old Acts (24 Hen. VIII. c. 10; 8 Eliz. c. 15) they are declared noxious animals (see *Hannam v. Mockett*, 1824, 2 Barn. & Cress. 934).

If people bring wild birds in quantities on to their land for their own purposes, they may be liable for their incursions on to adjoining land (*Farrer v. Nelson*, 1885, 15 Q. B. D. 58).

If wild birds, even those ordinarily kept in confinement, escape, it is not criminal nor actionable to retake and appropriate them if their owner is not known (1 Hawk., P. C., bk. 1, c. 19, s. 40), and appropriation of wild birds by a servant sent to kill them on the land of his master, is not larceny or embezzlement (see *R. v. Read*, 1878, 3 Q. B. D. 131), although they become part of the land of the man on whose soil they are killed (*Blades v. Higgs*, 1865, 11 H. L. 621); and if they are appropriated as part of a distinct transaction for the killing, larceny is committed (*R. v. Townley*, 1870, L. R. 1 C. C. R. 315).

A decoy for wild fowl is so far recognised as involving an inchoate right of property in the wild fowl attracted, that an action will lie for doing acts such as firing guns with intent to frighten the wild fowl away and injure the owner (*Keeble v. Hickeringill*, 1708, 11 East, 574 n.; *Hannam v. Mockett*, 1824, 2 Barn. & Cress. 934, at 943); but this view, though still accepted as law (see *Mogul Steamship Co. v. McGregor* [1891], App. Cas. 25, at 51), seems to rest on the protection given by an old Act (25 Hen. VIII. c. 11), the expense incurred on making the decoy, and the value of wild fowl as food.

The provisions of the Larceny Act, 1861, and the Malicious Damage Act, 1861, set out under *Domestic Birds* above, also afford protection to the owners of singing birds, parrots, etc., which at common law were regarded of a base nature, and not the subject of larceny.

The Prevention of Cruelty to Animals Acts apply to birds ordinarily wild, only when they are so kept that they can be regarded as domestic animals (17 & 18 Vict. c. 60, s. 3). Linnets trained to act as decoys have been held "domestic animals" (*Colam v. Payett*, 1883, 12 Q. B. D. 66).

Besides the protection given by the Game Laws, there has been during this reign much legislation to protect other wild birds, their eggs and young. In 1871 (32 & 33 Vict. c. 17) sea birds, in 1873 (35 & 36 Vict. c. 78) certain wild birds during the breeding season, and in 1876 (39 & 40 Vict. c. 29) other wild fowl were given a measure of protection from indiscriminate slaughter. These Acts have been superseded by the Wild Birds Protection Acts of 1880 (43 & 44 Vict. c. 35), 1881 (44 & 45 Vict. c. 51), and 1894 (57 & 58 Vict. c. 23), which are read as one Act, and with the many orders made under them now regulate this subject-matter. They extend to Scotland and Ireland, but are not here discussed with reference to these countries.

A close time for all wild birds is created between March 1 and August 1, during which no wild bird may be shot or taken, under penalties recoverable under the Summary Jurisdiction Acts. In the case of birds named in the schedules to the Acts of 1880 and 1881, or added to the scheduled list under the Act of 1894, the penalty on summary conviction is not to exceed £1 per bird; in the case of other birds the offender is reprimanded on a first conviction, and liable, on subsequent conviction, to a fine not exceeding 5s. per bird (43 & 44 Vict. c. 35, s. 3). Offences within the admiralty juris-

diction (see **ADMIRALTY ACTION**) are within the Acts (s. 6). If a person found offending refuses to give his name and address, he may be subjected to additional penalties on conviction (s. 4).

The Acts do not apply to the owner or occupier of land, or any person authorised by him, who kills on the land during the close time, any wild bird not scheduled (1880, s. 3). But this exemption does not extend to cases where a man, with the consent of the occupier of land, shoots sparrows out of traps caught without authority on the lands of others during close time (*R. v. Gilham*, 1884, 52 L. T. 326).

The close time may be extended or varied, or the whole or part of a county exempted from the Act as to all or any birds, by the Home Secretary on the application of a County Council (40 & 41 Vict. c. 35, ss. 8, 9; 51 & 52 Vict. c. 41, s. 3).

Exposure for sale of wild birds during close time is also punishable with the same penalties as killing the birds, unless the defendant satisfies the Court (1880, s. 3; 1881, s. 1)—

- (1) That the bird, if killed in a place to which the Acts extend, was lawfully killed under the Acts.
- (2) That the bird was killed in a place to which the Acts do not extend, or was an imported bird.

These Acts did not apply to birds' eggs (*Guyer v. R.*, 1888, 23 Q. B. D. 200). But the Act of 1894 empowers the Home Secretary, on the application of a County Council, to issue orders prohibiting the taking or destroying of the eggs of all or any specified kinds of wild birds within the limits of a county or any part thereof (s. 2). The power to make orders is not confined to the scheduled lists. The County Council must publish the order annually. Disobedience to the order entails a penalty not exceeding £1, recoverable on summary conviction.

The orders issued under these Acts are very numerous. Many were issued in 1896, of which copies can be got from the Queen's printers. They are also gazetted.

In 1888 an Act, now expired (51 & 52 Vict. c. 55), was passed for the protection of sand grouse for a limited period, which ended in 1892.

[See also Warry on *Game Laws*, 1896, pp. 240–246; Oke, *Handbook of the Game Laws*, 3rd ed., 1881.]

**Birth, Concealment of.**—In 1624 (by 21 Jas. I. c. 27) it was enacted that a woman should suffer death as in case of murder, if, on being delivered of a *bastard* (*q.v.*) child, she endeavoured privately either by drowning or secret burial or any other way, either by herself or the procuring of others, to conceal the death of the child, so that it might not come to light whether it was born alive. She could excuse herself by proving by one witness that the child was still-born.

This barbarous enactment continued in force until 1803, when the ordinary rules of evidence were applied to charges against women for murdering their bastards, and concealment of birth was made punishable (43 Geo. III. c. 58, ss. 3, 4; and see *R. v. Cornwall*, 1817, Russ. & R. 336).

The Act of 1803 was repealed in 1828, and the offence was punished from that date till 1861, by 9 Geo. IV. c. 31, ss. 1, 14, which was then repealed (24 & 25 Vict. c. 95), and replaced by 24 & 25 Vict. c. 100, s. 60, under which it is a *misdeemeanour* for any person (not merely the mother as in the earlier Acts) by any secret disposition of the dead body of any newly born child, whether it died before or at or after its birth, to endeavour to conceal



the fact of its birth. The offence is no longer in law confined to bastard children, though it is oftenest committed with respect to them. The punishment is imprisonment with or without hard labour for not over two years and (or) fine and (or) sureties (24 & 25 Vict. c. 100, ss. 60, 71). The costs of the prosecution are payable out of the local rate (24 & 25 Vict. c. 100, s. 77). The offence is not triable at Quarter Sessions (5 & 6 Vict. c. 38, s. 1 (12)). Persons procuring, inciting, aiding or abetting the concealment are liable as principals (24 & 25 Vict. c. 94, s. 8; c. 100, s. 67). See ABETTOR.

On an indictment, or inquisition (*R. v. Maynard*, 1812, Russ. & R. 240) for the murder of a new-born child, the jury may, on acquitting for the murder, return a verdict, if the evidence so warrants, that the child had recently been born, and that the accused had endeavoured by some secret disposition to conceal its birth. Upon this verdict the accused may be sentenced as if she had been indicted and convicted for concealment of the birth (24 & 25 Vict. c. 100, s. 60).

Under the Act of 1829 it was held that the offence is not committed unless the foetus has reached a stage of development at which it could have been born alive (*R. v. Berriman*, 1854, 6 Cox C. C. 388). This view is sustained by *R. v. Hewitt*, 1866, 4 F. & F. 1101, on the Act of 1861, but is not quite consistent with that of Martin, B., in *R. v. Colmer*, 1864, 9 Cox C. C. 506. See ABORTION.

By "secret disposition" is meant placing the body where it is not likely to be found except by accident or on search (*R. v. Brown*, 1870, L. R. 1 C. C. R. 244; *R. v. Clark*, 1883, 15 Cox C. C. 171). The mode of the secret disposition should be specified in the indictment. The disposition need not be final, but may be temporary only (*R. v. Perry*, 1855, 24 L. J. M. C. 137). The body said to have been secretly disposed of must have been found, and must be described as and proved to be the child of the person in respect of whose child the offence is charged, and the mother of the child cannot be convicted unless she was party or privy to the disposition of its dead body (*R. v. Williams*, 1871, 11 Cox C. C. 684; *R. v. Bate*, 1871, 11 Cox C. C. 686).

The statements in Archbold, *Cr. Pl.*, 21st ed., 827–830, as to this offence, and in particular as to the form of indictment, appear to be made with regard to the Act of 1829, rather than that of 1861.

**Births, Registration of.**—Under an ordinance of the Long Parliament passed in 1653 (c. 6, Scobell, p. 236) provision was made for a system of civil parochial registration of births, which lapsed on the Restoration.

In 1694 under a taxing Act (6 & 7 Will. & Mary c. 6) duties on births were levied for five years on a graduated scale according to the degree of the parents (s. 3). Notice of birth had to be given within five days to the collectors of revenue (s. 21); and the clergy had to keep a register of all christenings, and permit the collectors to inspect them (s. 20), and the form of entry was prescribed by 9 Will. III. c. 32, s. 3. In 1695 (7 & 8 Will. III. c. 35) the parents of a child were required to give notice of its birth to the parson of their parish within five days of the birth. The duties were in 1696 (8 & 9 Will. III. c. 20, s. 14) continued until 1706, but the purpose of these expired Acts was fiscal only.

Under the Baptismal and Burial Registers Act, 1812, 52 Geo. III. c. 146, steps were taken to prescribe the form and ensure the preservation of the

ecclesiastical registers. The full title of the Act refers to birth registers, but the Act itself does not deal with them, and it was not until 1836 (6 & 7 Will. iv. c. 86) that registration was made a civil and national concern. Till then the registers had been in the custody of parish clerks, and had been so ill kept as to create great difficulties in proof, especially of marriages (21 Cobbett, *Parl. Deb.* 947). The legislation of 1836 flowed from the reports of the Real Property Commissioners, which disclosed the necessity for purposes of vital statistics and of title and succession of a complete system of registration, which should include not only persons who were baptized, married, or buried according to the rites of the Established Church, but also those of Nonconformist communities (34 Hansard, *Parl. Deb.*, 3rd series, 132; 35 ditto, 79). The general scheme of registration is dealt with under REGISTRAR-GENERAL; and here it need only be said that under the Act of 1836 the unit was changed from the parish to the poor law union, and the functions of registration taken away from the parish officers, civil and ecclesiastical.

*Procedure.*—The provisions of the Act of 1836 (6 & 7 Will. iv. c. 86) as to registering births (ss. 19–28) were superseded and repealed by secs. 1–8 of the Births and Deaths Registration Act, 1874. Still-born children are not registered either in the birth or death register. Where a child is born alive in England or Wales information of its birth must within forty-two days be given by the father (unless the child is a bastard) or the mother, or on their default by the person who has the charge of the child, or the persons present at its birth (thus including doctor and midwife), or the occupier of the house in which it is born (s. 1). If information is not given within the forty-two days by one of these persons, the registrar serves a written notice on any of them, requiring him to attend at some time within three months of the birth and give the information (s. 2). If a living new-born child is found exposed, the finder or the person in whose charge it is placed (and not as formerly the overseers) must give the best information he has within seven days of the finding (s. 3).

Births of children at sea on British public vessels are registered under sec. 37 of the Act of 1874, and returns are sent under sec. 37 (6) to the Registrar-General. The registration of births at sea on other British vessels is regulated by sec. 254 of the Merchant Shipping Act, 1894, 57 & 58 Vict. c. 68.

Registration is effected by the entry on the register, on the information of one of the persons already named, of the date and place of birth, the sex and parentage of the child, and signature of the entry by the informant. If the child is a bastard (*q.v.*), the putative father's name must not be entered unless at the joint request of father and mother, who must both sign the register (Act of 1836, Sched. A, B; Act of 1837; Act of 1874, ss. 7, 47). As to a child under three months no charge may be made unless the registrar goes to the informant at his request, for which the fee is 1s. (s. 27, Sched. 2). For registering a child between three and twelve months the charge is 2s. 6d.; after twelve months, 5s.

The name of the child may be registered, either when the birth is registered, or at any time within twelve months of birth, on producing a certificate of baptism or of naming without baptism (ss. 8, 43, Sched. 1). The minister or person who baptized must give his certificate of baptism on demand for 1s. (s. 8). After the three months are over the proper informant can or can be required to make a solemn declaration before a superintendent-registrar, and register the birth in his presence. After twelve months a birth may not be registered without the written authority

of the Registrar-General (s. 5). The registration is effected in the district in which the birth took place, subject to provisions for facilitating registration in cases of removal (s. 6).

The Registrar-General, under sec. 8 of the Act of 1837 (7 Will. iv. and 1 Vict. c. 8), can order entry in the register of the place of birth, and errors made in the register may be corrected, under secs. 27, 36, Sched. 2 of the Act of 1874, for a fee of 2s. 6d., payable by the person asking for the correction.

*Offences.*—The lawgiver has manifested a perverse ingenuity of language in multiplying offences with reference to registration of births and deaths. Under sec. 39 of the Act of 1874 it is an offence punishable on summary conviction by penalty not exceeding 40s.—(a) for a person primarily bound to give information to fail in so doing; (b) for a person required to give information wilfully to refuse to answer questions put to him by the registrar as to the statutory particulars; or (c) for failing to comply with any requisition of the registrar (under secs. 2, 5). Under sec. 40 it is a misdemeanour—

- (i.) Wilfully to make false answer to questions by the registrar as to the statutory particulars;
- (ii.) Wilfully to give false information to a registrar as to a birth;
- (iii.) Wilfully to make a false declaration under the Act;
- (iv.) To forge or falsify a certificate, declaration, or order under the Act, or to use, give, or send as true any such certificate, etc., known to be false or forged;
- (v.) Wilfully to make, give, or use any false statement or representation as to a child born alive, having been still-born, or falsely to pretend that any child born alive was still-born;
- (vi.) To make any false statement with intent to have it entered on the register.

These offences are punishable on summary conviction within six months of the offence by a penalty not exceeding £10, or on indictment within three years of the offence by penal servitude from seven to three years, or imprisonment with or without hard labour for not over two years. Where summary proceedings are taken, the Court, if it thinks the case one for indictment, may adjourn it for that purpose (Act of 1874, ss. 40, 45, 46; 54 & 55 Vict. c. 69, s. 1). These offences were under the Act of 1836, s. 38, treated as cognate with perjury, and could not be tried at Quarter Sessions (5 & 6 Vict. c. 38, s. 1 (7)). Whether, as now described, they are there triable, is not clear.

Under sec. 36 of the Forgery Act, 1861, 24 & 25 Vict. c. 98, it is a felony—(1) unlawfully to destroy, deface, or injure the whole or any part of any register of births authorised or required by law to be kept;

(2) To forge or fraudulently alter any entry in any such register relating to a birth or any part of such register, or any certified copy of the register or of any part of it;

(3) Knowingly and unlawfully to insert or cause or permit to be inserted in any such register, or in any certified copy thereof, any false entry of any matter relating to any birth;

(4) Knowingly and unlawfully to give a false certificate as to a birth or certify as copy or extract from a register, any document known to be false in a material particular;

(5) To forge or counterfeit the seal of a register office; and

(6) To utter any of the forged or falsified writings, etc. above referred to, with knowledge of their forged or altered character.

These felonies are punishable by penal servitude for life or not less than three years, or imprisonment with or without hard labour for not over two years (24 & 25 Vict. c. 98, s. 36; 54 & 55 Vict. c. 69, s. 1), and are not triable at Quarter Sessions (5 & 6 Vict. c. 38, s. 1).

Similar provisions are made as to non-parochial registers kept in the General Register Office by sec. 8 of the Non-Parochial Registers Act, 1840, 3 & 4 Vict. c. 92.

*Evidence, etc.*—Certificates of registration of birth must be given on demand, either at the General Register Office, or by the registrar of the district. If the demand is made at the time of registration, the fee is 3d.; if at other times, 2s. 7d.

The entry or a certified copy of it is not evidence, unless it purports to be signed by a person professing and qualified to be the informant, or to be made under the provisions as to registration of births at sea (1874, s. 39). Though in all other respects regular, the certificate is useless in evidence, unless identified with the particular child, and it has been long said that a certificate of baptism is at least evidence that a child was produced, whereas anyone can go and register a child as born (*vide* the *Salisbury* case). Parochial registers of baptism have always been accepted as evidence (*In re Turner*, 1885, 29 Ch. D. 985). Non-parochial registers deposited in the General Register Office, with certain specified exceptions, were made so by sec. 6 of the Non-Parochial Registers Act, 1840, 3 & 4 Vict. c. 92. See BAPTISM; ELEMENTARY EDUCATION; FACTORY; VACCINATION.

**Bishop.**—The title is given to members of the highest order in the Christian Church.

The word prelate, which in England is now always used of the episcopate, properly implies an ecclesiastic having jurisdiction over ecclesiastics, and was formerly also applied to abbots.

The duties of the bishops, as representing the apostles, are generally to superintend and direct the Christian flock, both clergy and laity, under their jurisdiction, which they do both by visitations and the issue of pastoral charges; and to appoint and ordain subordinate ministers. On this subject, see Van Espen, *Jus Canonicum De curâ episcopali*, pars. 1, tit. 13.

Episcopacy has been described as an ordinary standing charge affixed to one place and requiring a special attendance there. At any rate from the second century the Christian episcopate began to adopt the territorial divisions of the Roman Empire, the diocese, and later on the province.

Of the first origin of episcopacy in Britain it is impossible to speak with certainty. British bishops, however, appeared at the Council of Arles in the fourth century. The four Welsh bishoprics which represent the old British Church at a later time constituted *Ecclesia Walensica* (the Church of Wales), and were not finally merged in the province of Canterbury until the thirteenth century. (For the names of bishoprics in England and the division of the provinces, see ARCHBISHOP.)

The first Archbishop of Canterbury was St. Augustine, A.D. 597–604, but the diocesan organisation of the Church of England may be said to date from Theodore, who was Archbishop of Canterbury A.D. 668–690, although York was not finally constituted into a separate province until A.D. 735.

Episcopacy has through all changes been regarded as the essential order of the Church of England. Thus the Statute of Provisors, 1350 A.D., 25 Edw. III. stat. 4 (printed inaccurately stat. 6), states “that whereas the holy Church of England was founded in the estate of prelacy within the realm

of England." See also the preface to the ordinal in the prayer-book in 1552, which is continued in later editions, and has the force of statute law. (See also Act of Uniformity, 14 Car. II. c. 14.)

The nomination and election of bishops are dealt with under *CONGÉ D'ÉLIRE*; but it may here be noted that by the Bishoprics Act, 1878, 41 & 42 Vict. c. 68, s. 6, the bishops of the four Sees of Liverpool, Newcastle, Southwell, and Wakefield, founded by that Act, are to be appointed by letters patent from the Crown until there are deans and chapters of the cathedral churches of those Sees. And a similar provision had been made with reference to the Sees of Truro and St. Albans by the Bishopric of Truro Act, 1876, 39 & 40 Vict. c. 54, s. 6, and the Bishopric of St. Albans Act, 1875, 38 & 39 Vict. c. 34, s. 8.

A bishop, having been elected or appointed by letters patent (whether under the above-mentioned Acts or under 25 Hen. VIII. c. 20, s. 4 (5) (1533) and confirmed, see *CONGÉ D'ÉLIRE*), is then consecrated, unless he have been already consecrated on appointment to some other See. The consecration is performed in obedience to a royal mandate directed to the archbishop of the province, or if the archi-episcopal See be void to any other archbishop within the realm or in the royal dominions, and within twenty days of its receipt; the mandate, if the person to be consecrated has been elected or appointed by letters patent to an archbishopric, being directed to an archbishop and two bishops, or four bishops (25 Hen. VIII. c. 20, ss. 4, 5, 7). The archbishop or bishops to whom the mandate is directed are, according to the statute, not only to invest and consecrate the new bishop, but to give him all pall and other benedictions, ceremonies and other requisite things, without obtaining therefor any bull or other thing at Rome; but upon the publication of the revised ordinal in 1550, the use of all ceremonies not therein directed ceased. The present order for the consecration of an archbishop or bishop in the English Church is annexed to the Book of Common Prayer, and is substantially that published in 1550; but with the omission of the delivery of the pastoral staff to the newly-consecrated bishop, which ceremony found no place in the ordinal of 1552, and has not since been restored. The words in the sentence of consecration specifically referring to the episcopal office, and the collect, were added in 1662. (See *HOLY ORDERS*.) The consecration is to be performed on some Sunday or Holy Day, and the ordinal provides for the presence of at least two bishops besides the archbishop. A bishop is not completely bishop till he has been consecrated, and preferments previously held by him are therefore not vacated till his consecration. After the bishop is in possession of his new See by consecration (or, if translated, by confirmation), he sues his temporalities out of the sovereign's hands, and is then enthroned (if an archbishop) or (if a bishop) installed in his cathedral; and takes from the royal hands the restitution of all the profits, spiritual and temporal, belonging to his See, thereby obtaining the full privileges of a bishop (25 Hen. VIII. c. 20, s. 6). The enthronement or installation is, in the province of Canterbury, performed by the Archdeacon of Canterbury; and consists in placing the new prelate in the episcopal throne as a token of his entry into possession of his See. Finally, the bishop is introduced into the royal presence; and, kneeling and putting his hands between those of the sovereign, does homage for his temporalities or barony, and takes a solemn oath of fidelity and of acknowledgment that he holds his temporalities of the Crown. (See also *OATH OF ALLEGIANCE*.)

The ceremony of episcopal homage dates from an arrangement made between Henry I. and Archbishop Anselm in 1107 as the English solution

of the investiture controversy; the archbishop agreeing to the homage, while the king renounced his claim to deliver the pastoral staff and ring to newly-created bishops.

The duties and rights of English bishops must next be considered. Bishops are directed by various canons and constitutions to reside at their cathedrals and officiate in Advent and Lent and at festival seasons, unless prevented by just cause (see, *e.g.*, Lindwood, p. 131), and to visit their dioceses at fit seasons, administering the rite of confirmation when and where it is required.

Bishops are summoned to the House of Lords by a writ of summons, and sit as lords spiritual. The right of the bishops to sit as Lords of Parliament dates from the earliest times. Archbishops and bishops were members of the Anglo-Saxon Witenagemote, and they must have sat there as royal counsellors and not in respect of their baronies, as in Anglo-Saxon times they held their lands free of all but spiritual services.

In 1692 the House of Lords resolved that "the bishops are only Lords of Parliament, but not peers, for they are not of trial by the nobility."

But historically the view that bishops are not peers can hardly be supported. In criminal trials in the House of Lords and in the Court of Lord High Steward, the bishops withdraw but only under protest (see Anson, *Law of the Constitution*, p. 213; Stubbs, *Const. Hist.* vol. iii. p. 443). It may be added that in the writ summoning a bishop to Parliament he is summoned "*fide et diligentia*," on his faith and love, and not like a temporal peer, "*fide et ligeantia*," on his faith and allegiance. Originally all archbishops and bishops were entitled to seats in the House of Lords, as also were mitred abbots before the dissolution of the monasteries. The Acts 10 & 11 Vict. c. 108, which established the See of Manchester, and the Acts establishing the Sees of Truro and St. Albans, provide that the number of lords spiritual should not be increased by such foundations; and the Bishoprics Act, 1878, 41 & 42 Vict. c. 68, s. 5, which provides for the foundation of four bishoprics, has or makes a similar provision. Under these Acts when there is an avoidance of any See other than those of Canterbury, York, Durham, and Winchester, the vacancy in the House of Lords is supplied by the summons of the senior bishop not previously entitled to the writ.

At the present time there are twenty-six spiritual peers in Parliament, two archbishops, and twenty-four bishops.

But bishops are not entitled to be tried by the House of Lords.

The powers of a bishop are three in number—(1) *Potestas ordinis*, derived from his consecration, in virtue of which he confers orders, confirms, consecrates churches, chapels, burying grounds, and takes the resignation of a church; (2) *Potestas jurisdictionis*, which he obtains at confirmation, and by which he acts as an ecclesiastical judge in his diocese; (3) *Administratio rei familiaris*, also obtained at confirmation, by which he governs his revenue. For the mode by which the episcopal jurisdiction is exercised, see CONSISTORY COURT, ARCHDEACON, and DISCIPLINE; and for the law relating to admission to benefices, see PRESENTATION and ADVOWSON. Bishops have the styles of Lord and Right Reverend Father in God. The Bishop of London ranks among the clergy next after the Archbishop of York (see ARCHBISHOP), and is followed by the Bishops of Durham and Winchester, and the other bishops, according to the seniority of their consecration; except that a bishop being a Privy Councillor ranks next after the Bishop of Durham. In general precedence, bishops rank after the younger sons of marquises.

By secs. 25-28 of 34 & 35 Vict. c. 43, 1871, an archbishop or bishop may employ a surveyor approved by the Ecclesiastical Commissioners to inspect any house or other building which he is bound to maintain in repair at his own cost, and the certificate of the surveyor that the works which he considers necessary have been executed is conclusive evidence thereof; and by 23 & 24 Vict. c. 124, s. 9, 1860, the estates committee of the Ecclesiastical Commissioners may require bishops to make good at their own expense or that of their tenants, dilapidations on the estates of the See; but by 29 & 30 Vict. c. 111, s. 12, 1866, not the incoming prelate but the Ecclesiastical Commissioners have a remedy for dilapidations against the late bishop or his representatives (see ECCLESIASTICAL COMMISSIONERS). And the Commissioners may, with the consent of the bishop, sell or exchange the episcopal lands (3 & 4 Vict. c. 113, s. 68, 1840); and by 23 & 24 Vict. c. 124, s. 8, 1860, the bishop may grant building or mining leases with the consent of the estates committee, and other leases up to twenty-one years without such consent. The bishop has the authority of determining the order of sittings in churches, and, by canon law, the general regulation of ritual; but see PUBLIC WORSHIP. He may convene a synod of the clergy of his diocese. A bishop's See becomes vacant on his death, translation to another See, deprivation (see DISCIPLINE and ARCHBISHOP; also *Ex parte Read*, 1888, 13 P. D. 221; *Read v. Bishop of Lincoln*, 1889, 14 P. D. 88; and *Lucy v. Bishop of St. David's*, 1699, and the other cases referred to in *Read v. Bishop of Lincoln*), or resignation. A bishop's resignation, to be canonically valid, must be voluntary, and made on some just ground, with the consent of his superior or the chapter of the cathedral church. To facilitate the resignation of a bishop in cases where it is desirable on the ground of incapacity from age or mental or bodily infirmity, the Bishop's Resignation Act, 1869, 32 & 33 Vict. c. 111, made perpetual by 38 & 39 Vict. c. 19, 1875, was passed in 1869. Sec. 2 provides that on a representation being made to the Queen by the archbishop of the province at the instance of the bishop, in the case of a bishop desirous of resigning, and, in the case of an archbishop so desiring, by himself, Her Majesty, if satisfied of the incapacity of such archbishop or bishop, and of his canonical resignation, may by Order in Council declare the See vacant; and that thereupon the vacancy may be filled as if the retiring prelate were dead, except that he is to be allowed, per annum, as retiring pension, one-third of the episcopal income or £2000, whichever be the greater, and that upon special grounds he may be allowed the use of any episcopal residence hitherto occupied by him.

During the vacancy of a See, the archbishop is guardian of the spiritualities by prescription or composition (see ARCHBISHOP). The guardian of the spiritualities can grant licences, admissions, and institutions; but he cannot as such consecrate, or ordain, or present to benefices, or confirm a lease. The guardian's power ceases at the new bishop's confirmation. The temporalities (*i.e.* manors, lands, tithes, etc.) of the See are in the sovereign's hands during a vacancy; and the new bishop cannot claim them as of right till he has been consecrated and installed. A bishop is a corporation sole, and a bond given to him passes, on his death, to his personal representative (*Howley v. Knight*, 1849, 14 Q. B. 240). The ornaments of his chapel, however, go to his successor.

In addition to diocesan bishops, whose status is treated of above, there are now in England, and recognised by the law, (1) suffragan bishops, (2) coadjutor bishops. (1) Suffragan bishops were originally consecrated to take the place of the diocesan, when absent on an embassy or on weighty

church matters, in ordaining and confirming, but not as to grave matters of jurisdiction; and they first appear in 1240. They have the title of "lord." Suffragans are now appointed under the provision of 26 Hen. VIII. c. 14, 1535, which names the towns from which their titles are to be taken (to and for which the Queen may add and substitute others (51 & 52 Vict. c. 56, 1888)), and enacts that a bishop desiring a suffragan shall submit two persons to the sovereign, one of whom the Crown may appoint and present to the archbishop for consecration, within three months, at his hands and those of two bishops named by the bishop desiring the suffragan, or the latter himself. And a suffragan may hold two benefices with cure. There are at present numerous suffragan bishops in England.

(2) Coadjutor bishops have from ancient times been appointed to assist bishops unfit, through age or infirmity, for the discharge of their office; and express provision is made for their appointment by secs. 3-14 of the Bishop's Resignation Act, 1869, which give in detail the procedure necessary to obtain the appointment of a coadjutor, and name his salary and rights. Former diocesan bishops in the United Kingdom and the colonies also frequently assist in purely spiritual functions in England, without formal appointment as suffragans.

[*Authorities*.—Phillimore, *Ecclesiastical Law*, 2nd ed.; Van Espen, *Jus Canonicum*; Godolphin, *Repertorium*; Ayliffe, *Parergon*; Anson, *Law of the Constitution*; Stubbs, *Constitutional History*.]

### **Bishop's Court.**—See CONSISTORY COURT.

**Black Book of the Admiralty.**—"This book contains the ancient ordinances and laws relating to the navy, and was probably compiled for the use of the Lord High Admiral of England. Selden calls it 'the jewel of the Admiralty records,' and Prynne ascribed to it the same authority in Admiralty as the Black and Red Books have in the Court of Exchequer" (Headnote to the Black Book in the catalogue of *Monumenta Juridica*). Reference is made to it by Dr. Exton, judge of the Admiralty Court in 1664, and Prynne (1669), as "containing the ancient statutes of the Admiralty to be observed both in the ports and harbours, and the high seas, and beyond the seas, and having been kept for the use of the judges of the Admiralty successively." Selden also says of it, "the book itself is rather a monument of antiquitie, yet not above about Henry VI., than of autoritie, and rather as a purpose of what was in some failing project than now in use and judgment held authentical. Most of it is against the now received and former practise." Sir Travers Twiss in his edition of it in 1871 ascribes the compilation of the earlier parts of it to about 1340,—in the reign of Edward III.,—or other parts of it perhaps to 1420, possibly for the use of Sir Thomas Beaufort, First Lord High Admiral of England at the beginning of the fifteenth century. Story, J. (in *De Lovio v. Boit*, 1815, 2 Gall. 403, U.S.), speaks of it as "the highest authority in matters concerning the Admiralty." The book was lost from the beginning of this century till 1873, and is now in the Admiralty Registry. Sir Travers Twiss' edition of it in *Monumenta Juridica* is exhaustive as to its history and contents.

**Black Cap.**—A judge of the High Court possesses as part of his judicial costume a square limp cap of black cloth which he puts on over



his wig on certain solemn or state occasions, *e.g.* when passing sentence of death, attending divine service in state, or on circuit, or receiving the Lord Mayor of London on 9th November. The practice rests purely on ancient usage, and is not in any way necessary, except in popular opinion, for the validity of sentence. When the judges passed through Westminster Hall in procession to go to the Royal Courts of Justice they wore their black caps, and to a request for explanation it was answered "because they were going out of doors."

The black cap is quite distinct from the *coif*, and is an attenuated survival of the "pointed cap" worn by the Elizabethan judges (over the *coif*), which continued in use until the Rebellion (Dugdale, *Origines*, c. 38). On the adoption of the full-bottomed wig it could no longer be worn in the old way, and it shrank, like an organ by disuse, into its present form. The same form of cap, by addition of stiffening, is still employed as the trencher-cap or mortar-board of the English Universities. There is another form of black cocked hat, also used by the judges for ceremonial purposes, which will not open.

The object of using the black cap had nothing to do with veiling in the presence of death (Pulling, *Order of Coif*, 221), but merely asserted the supremacy or authority of the judges derived from their commissions as delegates of the royal authority in justice. It is the right of the superior to be covered. Compare the practice of the Lords Commissioners in putting on their hats when bringing down royal assent to bills, and of the Chancellor of the University when sitting at the encaenia for conferment of degrees. And the occasions for the assertion of judicial superiority were, it will be seen, when the judges were in the presence of municipal functionaries, or as in church and after disallowing benefit of clergy, in the presence of ecclesiastical rights.

**Blackleg.**—A "blackleg" is properly a man who makes his living by betting and playing at cards. According to Pollock, C. B. (3 H. & N. at p. 379), the word does not necessarily imply that the person so described cheats or is guilty of any conduct that is criminal, but merely that he "gets his living by frequenting racecourses and places where games of chance are played; getting the best odds and giving the least he can"; and he therefore held that the word, when spoken, was not actionable without proof of special damage. Baron Watson said that the word did not "convey any precise notion" to his mind. But Barons Martin and Bramwell understood "blackleg" to mean one who habitually wins money by fraud and malpractice, conduct which is clearly indictable, and that therefore the action lay (*Barnett v. Allen*, 1858, 3 H. & N. 376; 27 L. J. Ex. 412). In that case, the plaintiff and defendant, who were tradesmen at Woolwich, met at supper in a public-house kept by one Reynolds, where there had just been a raffle, in which they had both taken part; and the defendant said of the plaintiff: "I am surprised at Mr. Reynolds allowing a blackleg in this room." These words were laid in the declaration with a proper innuendo. At the trial a witness was asked what he understood by "blackleg." The question was objected to by the defendant's counsel, but allowed by the learned judge (Erle, J.). The witness replied, "I understood 'blackleg' to mean a person in the habit of cheating at a particular game at cards." And the Court of Exchequer was equally divided, not only as to the meaning of the word, but also on the point whether this question could properly be asked, and whether the answer was admissible in evidence. So the

verdict given below for the plaintiff stood. And the "better opinion" now is that the evidence was admissible, and that to call a man a "blackleg" is actionable, provided the Statement of Claim contains a sufficient innuendo (e.g. "meaning thereby a cheating gambler liable to be prosecuted as such," or "meaning thereby that the plaintiff had been guilty of the criminal offence of cheating at cards"), and provided it can be shown that the bystanders so understood the word. (See *Gordon-Cumming v. Green*, 1891, 7 T. L. R. 408.)

The same Court of Exchequer was, however, unanimous in holding that it was libellous and actionable to describe a man in writing as a "blackleg," or as "a confederate of blacklegs," though even in that case it would be safer to insert an averment that the word means a person guilty of habitually cheating and defrauding others (*O'Brien v. Clement*, 1846, 16 Mee. & W. 159; 16 L. J. Ex. 76, 77; *O'Brien v. Bryant*, 1846, 16 Mee. & W. 168; 16 L. J. Ex. 77). The word has sometimes been shortened into "leg." See *Digby v. Thompson*, 1833, 4 Barn. & Adol. 821, where the words "I do dislike this leg-al profession" were held libellous.

In recent labour disputes the word "blackleg" has been used in an entirely new sense, to denote a workman who accepts employment during a strike, and without the leave of the trade union, from a master whose men have "come out" on strike; or sometimes, more loosely, any workman who refuses to join the "union" of his trade. In this sense the word is not actionable, whether it be written or spoken, unless special damage has followed directly from its use.

**Black List.**—A list of persons or firms against whom its compiler would warn the public, or some section of the public; a list of persons unworthy of credit, or with whom it is not advisable to make contracts. Thus the official list of defaulters on the Stock Exchange is a black list; so is *Stubbs' Gazette* and many similar periodicals. Certain societies or individuals regularly publish to their subscribers lists of persons who have been adjudicated bankrupt, or who have had County Court judgments recovered against them, with the object of protecting their subscribers from fraud or bad debts; indeed, trade could hardly be carried on in the present day without the help of such agencies. Yet the circulation of any inaccurate statement by means of such lists may seriously injure, or even ruin, an honest and solvent trader. The information is given confidentially by the agency to its subscribers, and therefore should not be divulged. But it constantly is divulged, and sometimes to the very person to whom the information relates (see *Saunders v. Seyd & Kelly's Credit Index Limited*, 1896, 12 T. L. R. 546). And what is stated about this person is generally actionable. To publish in writing that A. B. recovered judgment in the County Court against C. D. for so much, is not, when taken wholly by itself, a libel on C. D. But when that statement appears in a "Black List" or "Trade Gazette," side by side with "Bankruptcy Notices" and entries as to "Bills of Sale," it at once suggests to the reader that such judgment is still unsatisfied, and that it is still unsatisfied because C. D. has not the means to pay his debts. Thus the announcement so published acquires a libellous meaning.

To an action for such a libel there are three defences possible.

1. *Truth.*—If the words are true, the plaintiff cannot recover. But though the words, taken literally, may be true, yet, if they convey to the reader something more than the literal fact, and that something more so conveyed is false, this defence fails. Thus in the case just put, although it

may be perfectly true that A. B. did recover judgment against C. D. on the day named for the amount specified, yet, if the jury think that the publication of that fact in a trade gazette implies that the judgment was still unsatisfied at the date of publication, the defendant must go further and prove that it was still unsatisfied at the date of publication. It is idle to justify the words in one meaning, if the jury find that they conveyed another. In *Williams v. Smith*, 1888, 22 Q. B. D. 134, the plaintiff had paid off the judgment before the date of the defendant's publication, and he therefore recovered £25 damages. But this difficulty may be overcome by prefixing, or appending to the announcements, a note (such as was done in England in *Scarles v. Scarlett* [1892], 2 Q. B. 56, and in Ireland in *Cosgrave v. Trade Auxiliary Co.*, 1874, Ir. R. 8 C. L. 349) explaining that many of the judgments recorded may have been satisfied since they were entered on the register.

2. *Judicial Proceedings*.—It may be a defence to such an action that the words are a correct transcript of the records of a Court, or a fair and accurate report of a judicial proceeding. Thus, no action will lie against the proprietor or publisher of any trade gazette for publishing, in the ordinary course of his business and without any actual malice, an exact transcript of a public register of the character of the Public Register of Scotch "decreets," or the Irish Register of Bonds and Judgments (*Fleming v. Newton*, 1848, 1 H. L. 363). This is so, even though the contents of the register prove to be inaccurate, provided that the defendant had, at the time of the publication, no knowledge or notice of the inaccuracy (*Annaly v. The Trade Auxiliary Co.*, 1889, 26 L. R. Ir. 11). But the plaintiff will be entitled to recover if there be an inaccuracy, though a slight one, in the transcript (*Jones v. M'Govern*, 1867, Ir. R. 1 C. L. 100, 681). And here again it is possible that the printed words, though correctly copied from the register, may yet be published in such a way as to convey a false and defamatory meaning. Thus, where the publisher of such a Black List left in it, as a still existing liability, a judgment which had been satisfied by payment and annulled, the Irish Court of Queen's Bench held that the jury might reasonably infer, from the time and place and manner of publication, that the words complained of amounted to an assertion that the judgment had not in fact been satisfied at the date of publication; and that the defendant therefore had inferentially published a statement which was false in fact, and which did not appear on the register, and therefore was not privileged; so that the plaintiff recovered damages (*M'Nally v. Oldham*, 1863, 16 Ir. C. L. R. 298). This, again, might be guarded against by publishing a proper headnote. And note that this defence only avails where the proceeding reported took place in a Court, or where the matter published is a copy of a record of some Court. For no privilege attaches to the publication of a correct copy of an entry in any register or other official document which does not relate to a judicial proceeding, even though such register or document is declared by Act of Parliament to be open to public inspection (*Reis v. Perry*, 1895, 64 L. J. Q. B. 566).

3. *Privilege arising from Interest*.—If anyone who has a legitimate reason for asking as to the antecedents or solvency of the plaintiff inquires from one who has special means of knowledge, it is the duty of the latter person to tell the former what he knows (*Robshaw v. Smith*, 1878, 38 L. T. 423). Hence so long as any trade agency or inquiry office merely answers questions asked by one of its subscribers, the reply will be privileged so long as it relates only to the same person as the question (*Waller v. Loch*, 1881, 7 Q. B. D. 619; 51 L. J. Q. B. 274). But many mercantile agencies

and trade protection societies have found that the most convenient, and indeed the only possible, way of supplying their subscribers with the information which they require, is to issue a printed weekly circular or notification sheet. This they send to all their subscribers, some of whom will be interested in one item, others in another item, but none in all the items of information contained in it. It is very doubtful whether any privilege attaches to the publication of such a sheet or circular. The point was recently discussed in the Court of Errors and Appeals in New Jersey, and the judges were divided in opinion; the majority (9 to 5) holding that such a method of communication was not privileged (*King v. Patterson*, 1887, 20 Vroom (49 New Jersey), 417; 83 L. T. (Journal) 408). But it is possible that in England, after the decision in *Andrews v. Nott Bower* [1895], 1 Q. B. 888, the Court might hold that the circulation of such a printed sheet was privileged, as being a reasonable and usual method of conveying to the subscribers the information which they needed for the safe conduct of their business.

In labour disputes a different kind of "black list" has been freely used. Trades-unions have frequently published a list of the names of the men who, during a strike, entered into the employ of the master whose men were "called out." This is terrorism, no doubt, but it is scarcely libellous. The first of such lists appeared in 1834, towards the close of the great strike in the building trades; such men were then called "blacks"; and the Stonemasons' Society issued a list of "blacks or negro-slaves," with a woodcut of a black slave in chains at the top, followed by the names of those who had gone in to work during the strike, and had thus helped to defeat their fellow-workmen. In 1894, when the men in the employ of Messrs. Trollope & Sons were called out by the secretary of the London Building Trades Federation, 175 men obeyed the order, but a large number remained. Thereupon the Federation published a large yellow poster with a black border, headed "Trollope's Black List," containing the names and addresses of non-union workmen employed at Messrs. Trollope's works, and also of all the men who remained on when the strike took place. About 750 copies of this poster were distributed to certain "lodges" and other resorts of workmen. Kekewich, J., granted an injunction to restrain any further circulation of this "Black List," on the ground that its publication was a purely malicious act, unnecessary for the protection of the defendants or the men whom they represented, actuated by ill-will, and intended to injure the plaintiffs and the men who still remained in their employ. The Court of Appeal, with some hesitation, affirmed the decision of Kekewich, J. (*Trollope & Sons v. London Building Trades Federation*, 1895, 72 L. T. 342; 11 T. L. R. 228, 280). Where the executive committee of a trades-union published a black list purporting to contain the names of those who had been expelled from the union for assisting a theatrical manager "in his endeavour to crush the union," adding, "Please make a mark against their names, so that if you meet them you will remember the reason of their expulsion," but the list was sent only to members of the union, and was marked "strictly private, and for the use of members only," Chitty, J., refused to grant an *interim* injunction, although the plaintiff swore that he never had been a member of the union, and could not therefore have been expelled (*Newton v. The Amalgamated Musicians' Union*, 1896, 12 T. L. R. 623). So, too, trades-unions have often published lists of "foul shops" or "rat-houses," i.e. of firms who do not pay the union rate of wages; and as long as those are published only to workmen in the particular trade, they could not, I think, be restrained by injunction. But where the secretary

of a trade-union employed men to parade the street bearing a placard: "To French Polishers. A strike is now on at Collard & Collard's against cheap labour and the sweating system of contract work"; and also sent a circular to a number of dealers in musical instruments, most of whom were customers of the plaintiffs, asking them "to assist us to put an end to the pernicious system of sweating at Collard & Collard's," Chitty, J., granted an injunction; for here the words were clearly libellous (*Collard v. Marshall* [1892], 1 Ch. 571).

Capitalists, too, have their "black lists." It is not uncommon for the leading manufacturers and retailers in a particular trade to combine, with the view of keeping up prices; and to publish to the members of their association a list of those manufacturers or retailers who refuse to join the "ring," and with whom, therefore, the members are forbidden to deal. As to this, see COMBINATIONS.

**Blackmail.**—The word mail comes from the Norman-French *maille* (*medalia* = small copper coin, Ste. Palaye, *Dict. Anc. Lang., Fr. s.v.*), which is used in an Act of 1335, 9 Edw. III. c. 3, in the sense of "half-penny." Blackmail appears to have three distinct meanings. 1. Its original meaning as the equivalent of *niger redditus*, namely, rent reserved in labour, cattle, or produce, or otherwise than in sterling money, as distinct from white rent paid in current coin or white money (*mailles blanches*) (2 Co. *Inst.* 19; 2 Bl. *Com.* 42; 3 Burn, *Justice*, 17th ed., 214). In this sense it is obsolete. Compare the Scottish law terms *Blanch Holding* and *Mail for Rent*.

2. Its proper and usual meaning is a tribute in money, corn, cattle, or other kind, levied by freebooters on the northern borders of England (i.e. Northumberland, Cumberland, Westmoreland, and the bishopric of Durham), for immunity from pillage. The levying or paying of this blackmail was in 1601 made felony without benefit of clergy (*q.v.*) (43 Eliz. c. 13, s. 1). There was similar legislation on the Scottish side of the Border. But the depredations of the Border freebooters did not cease till after the severe measures—executive and legislative—taken at the end of the seventeenth century against moss-troopers, or perhaps until the legislative union of England and Scotland. See Burn, *Justice*, 17th ed., tit. Northern Borders.

3. It is now popularly applied to the offences called in French "*chantage*," namely, extortion of money, etc., by threats of libel, prosecution, exposure, or bodily harm. These offences are not to be confused with "extortion," which at common law is confined to extortions by officials under colour of office. As to these forms of blackmail, see MENACES.

**Black Money** (Norm.-Fr., *noire monnaie*) is used in an Act of 1335, 9 Edw. III. c. 4, in the sense of "base money," which is also described in the same Act as "weak money" (*feble monnaie*), as distinguished from "sterling" money.

**Black Rod, Gentleman Usher of the.**—The Usher of the Black Rod, one of the officers of the Order of the Garter, is the chief usher of the kingdom, and is frequently styled Gentleman Usher of the Black Rod, and, as such, bears that title as an officer of the House of Lords; his appointment being by letters patent from the Crown.

The **Black Rod** of the Gentleman Usher, from which he derives his name, is the Black Rod of the Order of the Garter, and is a black wand surmounted by a golden lion of England. It is carried as a mace, or symbol of authority, in the performance of the duties with which the Gentleman Usher is intrusted. He is also a member of the sovereign's household in the Lord Chamberlain's department.

During the session of Parliament, Black Rod is in attendance on the House of Lords, and is the chief officer by whom communications between that House and the House of Commons are conducted; he, or his deputy, the Yeoman Usher, sitting without the bar of the House. In the case of an impeachment or trial for felony, or committal for contempt, the person charged, whether peer or commoner, is assigned to his custody, unless the House admit him to bail. He also attends, as officer of the Court, upon an impeachment or other trial of a peer, before either the House or the Court of the Lord High Steward.

In the latter case, Garter King at Arms and Black Rod present to the Lord High Steward, the white wand, which is the symbol of his commission, it being carried by Black Rod until the commission has been read; and afterwards it is borne by Black Rod until redelivered by him to the Lord High Steward, who breaks it when he has completed his commission. He, or his deputy, the Yeoman Usher, is sent to desire the attendance of the Commons at the bar of the House of Peers, at the meeting and prorogation of Parliament, or the giving of assent to bills; Black Rod when the sovereign attends in person for these purposes, the Yeoman Usher when Lords Commissioners are appointed. He executes orders for the commitment of parties guilty of breaches of privilege, and assists at the introduction of peers and other ceremonies, the due order and proceedings whereon he, by virtue of his office, must see correctly followed. If a witness is in custody by order of the House of Lords, and his attendance is required in the House of Commons, this is secured by a message desiring that he may attend in the custody of Black Rod.

[See May, *Parliamentary Practice*, 10th ed.: Todd, *Parliamentary Law*, p. 319.]

**Blandford's (Lord) Act.**—A title applied to the New Parishes Act, 1856, 19 & 20 Vict. c. 104, introduced by the Marquis of Blandford, afterwards Duke of Marlborough (140 Hansard, *Parl. Deb.*, 3rd series, 681).

The Act created "new parishes" for ecclesiastical purposes, including the burial of the dead (*Hughes v. Lloyd*, 1888, 22 Q. B. D. 157) and the publication of banns and solemnising marriages (*Fuller v. Alford*, 1882, 10 Q. B. D. 418). It has led to various controversies as to fees and freehold in burial-grounds between the incumbents of mother parishes and those of the new parishes (see *Champneys v. Arrowsmith*, 1867, L. R. 3 C. P. 107; *Cronshaw v. Wigan Burial Board*, 1873, L. R. 8 Q. B. 217).

**Blank Acceptance.**—See **BILLS OF EXCHANGE**; **BLANKS IN NEGOTIABLE INSTRUMENT**.

**Blank Indorsement.**—See **BILLS OF EXCHANGE**; **BILLS OF LADING**; **BLANKS IN NEGOTIABLE INSTRUMENT**.

**Blank Transfer.**—The name blank transfer is commonly used to denote a transfer of shares in a company (*q.v.*), executed without the name of the transferee having been filled in. Such transfers are very frequently made and deposited with the lender of money advanced upon the security of the shares, for the purpose of giving him power to deal with and realise the shares when he thinks fit so to do without further recourse to the borrower, and without the expense and delay entailed by the registration of the lender as a shareholder, or the withdrawal from the borrower of the status of shareholder until such realisation is required. It will be seen that, where the transfer must be by deed, this object is not attained.

1. *As between Mortgagor and Mortgagee.*—The deposit of a blank transfer of shares constitutes a good equitable security (*Ex parte Sargent*, 1873, 4 L. R. 17 Eq. 273); and it is evidence of an agreement to make an effective legal transfer, even though it is void as a deed and a deed is required (*Société Générale v. Walker*, 1885, 11 App. Cas. 20; *Colonial Bank v. Whinney*, 1885, 11 App. Cas. 426); and after it has been effected the shares would not be within the order and disposition of the bankrupt (see *BANKRUPTCY*, vol. i. p. 510) if the order and disposition section of the Bankruptcy Act applied to shares (*i.e.*, and *Morris v. Cannan*, 1862, 31 L. J. Ch. 425).

If the transfer need not be by deed, the mortgagee has implied authority to fill up the blanks with his own name or that of a purchaser from him, and to use the transfer to obtain the registration of himself or such purchaser in place of the mortgagor (*Ex parte Sargent*, 1873, L. R. 17 Eq. 273), but only for the purpose of giving effect to his rights as mortgagee; and he cannot delegate his authority to complete the instrument to another person (*France v. Clark*, 1884, 26 Ch. D. 257).

But a deed in blank as to the name of the transferee is void, and cannot be made effective until, after having been made up, it has been redelivered by the transferor or his agent (*Powell v. London and Provincial Bank* [1893], 2 Ch. 555). The transferee has no implied authority to so redeliver the transfer on behalf of the transferor, for such authority could only be conferred under seal (*i.e.*).

2. *As between Persons claiming under the Mortgagor.*—The rule by which the priority of rival claimants to shares is determined has been formulated by Romer, J., as follows:—"As between two persons claiming title to shares in a company under the Companies Act, 1862" (and the same rule applies in the case of other companies), "which are registered in the name of a third party, priority of title prevails, unless the claimant second in point of time can show that as between himself and the company, before the company received notice of the claim of the first claimant, he, the second claimant, has acquired the full status of a shareholder; or, at any rate, that all formalities have been complied with, and that nothing more than some purely ministerial act remains to be done by the company, which the company could not have refused to do forthwith"; so that he may be said to have acquired, in the words of Lord Selborne (in *Société Générale v. Walker*, *supra*), "a present, absolute, and unconditional right to have the transfer registered before the company was informed of the existence of a better title" (*Moore v. North-Western Bank* [1891], 2 Ch. 599). And to this must be added, that registration under a void or ineffective transfer does not alter or improve the position of the claimant who is registered (*Powell v. London and Provincial Bank*, *supra*; see per Kay, L. J., at p. 566), although as between the company and the transferor, if the registration has been long acquiesced in, the company may not be at liberty to treat it as ineffectual (*In re Taurine Co.*, 1883, 25 Ch. D. 118). In order to

ascertain whether a transfer executed in blank gives the person claiming under it priority over another claimant, who is earlier in point of time, under this rule, it is necessary to distinguish between cases, (a) where the transfer must be by deed, and cases (b) where an instrument in writing only is required.

(a) The Companies Clauses Consolidation Act, 1845, requires transfers of shares in companies governed by it to be effected by deed (s. 14) (see *Nanney v. Gordon*, 1887, 37 Ch. D. 346). So also do the articles of many companies, especially of the older companies formed under the Companies Act, 1862. That Act itself provides only that the shares shall be capable of being transferred in manner provided by the regulations of the company (s. 22). The deeds of settlement of some other companies require a deed (as in *Roots v. Williamson*, 1888, 38 Ch. D. 485). As already stated, a blank transfer is wholly void as a deed, and it cannot be treated as redelivered by the transferor if it is filled up, although this is done in accordance with the transferor's intention. Where, therefore, shares in a company regulated by the Companies Clauses Act stood in the name of a trustee, and he executed and deposited with his bankers transfers in blank as security for a loan to himself, and the bank, before they had notice of the trust, filled up the transfer and procured its registration, it was held that they had obtained no title to the shares so as to oust the prior equitable title of the *cestui-que-trust* (*Powell v. London and Provincial Bank*, *supra*).

If the mortgagor by deed expressly constituted the mortgagee his attorney to fill up and redeliver the transfer, the objection which proved fatal in the cases last cited would be avoided, and upon the regular exercise of the authority by the mortgagee his position would be the same as if no deed were required.

(b) The most usual provision in the articles of companies under the Companies Act, 1862, is that the transfer shall be by an instrument in writing executed by both parties (see Table A, art. (8)). Where this is the regulation, the blank transfer, when duly filled up, is as effective as if it had been completed before execution by the transferor. Thus where shares were mortgaged by the deposit of transfers, in which the transferor's name and the date were left in blank, and the mortgagee redeposited them to secure a larger sum with the holder, who had no notice of the fraud, it was held that the holder after having filled up the blank date and inserted his own name as transferee, was entitled to be registered (*Ex parte Sargent*, 1873, L. R. 17 Eq. 273; *Davies' case*, 1876, 33 L. T. 834). But as the condition of the transfer when it came to him should have put the holder upon inquiry, he would, in such case, have no better title than the person from whom he took the shares, that is to say, he would hold them only for the purposes intended by (*Ortigoza v. Brown, Janson, & Co.*, 1877, 38 L. T. 145), or to secure the sum due from, the original mortgagor (*France v. Clark*, 1884, 26 Ch. D. 257; *Colonial Bank v. Cady*, 1890, 15 App. Cas. 267; *Fox v. Martin*, 1895, 64 L. J. Ch. 473); and if such purposes comprised a power of sale by the mortgagee, then upon exercise of the power and delivery of the transfer to the purchaser, filled up with his name, he would be entitled to the shares (*In re Kimberly, etc., Co.*, 1888, 58 L. T. 305).

If the blank transfer is filled up and the shares are sold to a purchaser who pays for them upon the faith of it, and without notice that the transfer is not in order, or not being honestly dealt with, the purchaser obtains a good title to the shares by estoppel as against the true owner, if the latter, or anyone through whom he claims, executed the transfer (cp. *Goodwin v. Roberts*, 1876, 1 App. Cas. 476; *Colonial Bank v. Hepworth*, 1887,



36 Ch. D. 36; *Bentinck v. London Joint Stock Bank* [1893], 2 Ch. 120, and *ESTOPPEL*).

Large numbers of documents of title, such as share certificates and bonds, having blank transfers executed by the shareholder or payee named in the instrument indorsed upon them, have acquired, by custom, the property of passing by mere delivery. Such instruments, provided they are in order as required by the custom affecting them, pass as negotiable instruments to a purchaser. Where the blank transfer indorsed was signed by the executors of the shareholder named in the certificate, the instrument was held not to be in order so as to pass by delivery (*Colonial Bank v. Cady, supra*). In cases where the custom applies, the fact that the transfer is in blank does not (as in *France v. Clark, supra*) put the purchaser upon inquiring as to the right of the seller to deal with the instrument (*Colonial Bank v. Cady*, or *Colonial Bank v. Hepworth, supra*; *Venables v. Baring* [1892], 3 Ch. 527; and see *London Joint Stock Bank v. Simmons* [1892], App. Cas. 201; and *Sheffield v. London Joint Stock Bank*, 1888, 13 App. Cas. 333; see also *NEGOTIABLE INSTRUMENT*). Documents of title, although relating to shares in a foreign company, which pass in this way by delivery are liable to probate duty (*Stern v. The Queen* [1896], 1 Q. B. 211).

It makes no difference, where a deed is not required, that the instrument purports to be a deed and is sealed (*Ex parte Sargent, supra*; *Ortigoza v. Brown, Janson, & Co., supra*).

If the due execution of a transfer does not give the transferee, according to the constitution of the company, such an immediate and absolute right to registration as is described in the passage quoted above, for instance, because the transfer must be approved by the directors, then the transferee obtains no priority by reason only of the transfer (*Nanney v. Morgan*, 1887, 37 Ch. D. 346; *Moore v. North Western Bank* [1891], 2 Ch. 559).

3. *As between the Holder of the Transfer and the Company.*—The question whether the holder can claim to be registered or not depends upon whether the transfer is effective (as to which see above), and whether the constitution of the company requires anything beyond an effective transfer, as, for instance, the approval of the directors (*Moore v. North Western Bank* [1891], 2 Ch. 599), or the signature of the deed of settlement by the transferee (*Roots v. Williamson*, 1888, 38 Ch. D. 485). Under the Companies Act, 1862, a person becomes liable as a shareholder when he has agreed to become a member (s. 23). If he does so agree, it makes no difference, as regards his liability for calls, that the transfer, in pursuance of which his name was registered, was void (*Langer's case*, 1868, 37 L. J. Ch. 292). So, on the other hand, if the company accept an irregular transfer and register the transferee, the liquidator in a winding-up cannot put the transferor on the list (*In re Taurine Co.*, 1883, 25 Ch. D. 118).

4. *Blanks in other particulars.*—Transfers are sometimes left blank in other particulars than the name of the transferee, for instance, in respect to the date or consideration. Omissions such as these do not prevent the transfer being effective, unless the matters omitted are made essential to its validity by some statute or binding regulation of the company. And provisions requiring such matters to be stated would usually be regarded as directory only. Thus the Companies Clauses Consolidation Act, 1845, s. 14, requires every transfer of shares in companies coming under the Act to be duly stamped, and to state the true consideration; but no case can be cited to show that a misstated consideration or an erroneous stamp would invalidate the deed (per Lindley, L. J., in *Powell v. London and Provincial*

*Bank* [1899], 2 Ch. at p. 560). The absence of the matters referred to would, however, justify the company in refusing to accept or pass the transfer (see *Nanney v. Morgan*, 1887, 37 Ch. D. 364),—a transfer under the Companies Clauses Act, 1845, insufficiently stamped and not dated. In *Roots v. Williamson* (1888, 38 Ch. D. 485), where the date and consideration were omitted from the deed, the question of the effect of this omission was discussed but not decided (see Buckley on *Companies*, note to Schedule A, art. 8; and Palmer, *Company Precedents*, 5th ed., p. 272).

The rule laid down in *France v. Clark* (*supra*) is not generally followed in America (see Thompson on *Corporations*, chap. 38, and especially pars. 2592 and 2593; and *McNeil v. Tenth National Bank*, 1871, 1 Sich. N. Y. 325; 7 Amer. Rep. 341).

**Blanks in Deeds and other Documents.**—1. *Supplying the Omitted Matter.*—Omitted words may be supplied from the context or from other parts of the instrument if the intention sufficiently appears thereby (Elphinstone on *Interpretation of Deeds*, Rule 17, pp. 79, 80; per Lord Truro in *Mill v. Hill*, 1852, 3 H. L. at p. 847; see also *Daniel's Trusts*, 1876, 1 Ch. D. 375; and the note to *Roe v. Tramarr* in 2 Smith L. C., 10th ed., p. 503). Thus the name of the grantor (*Dart v. Clayton*, 1864, 33 L. J. Ch. 503) or the grantee (*Butler v. Dodton*, 21 Eliz. Cary, 123; *Lord Say and Sele's case*, 1712, 10 Mod. Rep. 40, 4 Bro. P. C. 73) may be supplied in the operative part from the recitals. In *Coles v. Hulme*, 1828, 8 Barn. & Cress. 568, "pounds" was supplied in a money bond, and in *Langdon v. Goole*, 1681, 3 Lev. 21, the name of the obligee (see also *Holden v. Raphael*, 1835, 4 Ad. & E. 223). But extrinsic evidence cannot be adduced to supply an omission, for if the intention cannot be gathered from the instrument itself, there is a "patent ambiguity" (see Bacon, *Laws Tracts*, 99, 100, cited by Taylor on *Evidence*, s. 1212). See AMBIGUITY. The omission of the *date* of a deed does not invalidate the deed (*Godard's case*, 2 Co. Rep. 4*b.*, ed. 1846, notes K. & L.; *Styles v. Wardle*, 1825, 4 Barn. & Cress. 908), and the deed operates as from the date of its delivery (*i.e.*), which is necessarily a matter of extrinsic evidence. Any reference to the date of the deed, if there is no expressed date, means the date of delivery (*i.e.*, and see Bac. Abr. Obligation C).

2. *Filling up the Blank.*—The filling up of a blank may be (1) such an alteration in a material matter of the instrument as to vary its effect from that it would have had as it was and was intended to be when executed by the parties. (In such case the deed is avoided (see the notes to *Master v. Miller* in 1 Smith L. C.; Elphinstone on *Deeds*, p. 19; and *Suffield v. Bank of England*, 1881, 7 Q. B. D. 270), except as evidence against the person who made or authorised the alteration (*Pattinson v. Luckley*, 1875, L. R. 10 Ex. 330). Thus in *Fazakerly v. McKnight*, 1856, 6 El. & Bl. 795, where a blank in a creditor's deed by which the plaintiff released the defendant's debt was filled up with the wrong amount, the whole deed was held to be inoperative so far as the plaintiff was concerned.) Or (2) it may be a correction required for carrying out the original intention of the parties and bringing the instrument into the form in which they intended it to be when they executed it. In this case the instrument is not avoided, and it takes effect as completed (Elphinstone, p. 26, citing Piggott on *Recoveries*, p. 213, and the note to *French v. Putton* in 9 East at p. 354; so *Dart, Vendors and Purchasers*, 6th ed., p. 274). Thus "putting in the real date is no alteration" (per Jervis, C. J., in *Keane v. Smallbone*, 1855, 17 C. B. 179),

or the date for redemption and names of the occupiers of the premises mortgaged, in a mortgage deed (*Adsetts v. Hives*, 1863, 33 Beav. 52) or similar matters (*Doe and Lewis v. Bingham*, 1821, 4 Barn. & Ald. 672), or the Christian name of a party (*Eagleton v. Gutteridge*, 1843, 11 Mee. & W. 465), or the subsequent execution by creditors of a deed of arrangement (*In re Batten*, 1889, 22 Q. B. D. 685; *Wood v. Slack*, 1868, L. R. 3 Q. B. 379; *quere* how far *Sellin v. Price*, 1867, L. R. 2 Ex. 189, and *Weeks v. Mailardet*, 1811, 14 East, 568, are overruled by these decisions) does not invalidate the instrument.

If blanks have been properly filled up in the presence of the parties, a re-execution or redelivering of the instrument as completed will be inferred (see *Hudson v. Revett*, 1829, 5 Bing. 368, where a very learned argument on the older authorities will be found; *Cole v. Parkin*, 1810, 12 East, 47); and in the case of a deed apparent alterations are presumed to have been made before its execution (*Doe v. Catmore*, 1851, 16 Q. B. 745).

But if material particulars are left out, as, for instance, the name of the grantee, because the particulars have not been agreed upon, the instrument is void so far as regards such operation as the omitted matter is material for. In cases of instruments other than deeds, authority by one party to the other to complete the instrument may be inferred, but in the case of a deed such authority would not suffice to make the deed effective, unless it were itself conferred under seal, because the deed would require to be redelivered after the completion (see the cases cited under BLANK TRANSFER; Taylor on *Evidence*, 9th ed., ss. 1835-1837; and *Hibblewhite v. M'Morine*, 1840, 6 Mee. & W. 200).

See further BLANKS IN NEGOTIABLE INSTRUMENT.

**Blanks in Negotiable Instrument.**—*Blank Signature; Blank in Material Particular; Date.*—Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit. In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact. Provided that if the instrument after completion is negotiated to a holder in due course it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given (Bills of Exchange Act, 1882, s. 20). Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly. Provided that (1) where the holder in good faith and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date (*ibid.* s. 12).

The sections apply to promissory notes, (s. 89) and cheques (s. 73).

The authority to fill in blanks conferred by these sections is not determined by the death of the party conferring it (*Carter v. White*, 1882, 20 Ch. D. 225; 25 Ch. D. 666). It will be observed that the rules do not apply to undelivered, e.g. stolen, bills (*Baxendale v. Bennett*, 1878, 3 Q. B. D. 525), and they do not exonerate a person taking a bill in blank from the necessity of seeing that the blanks are properly filled up (*Hatch v. Searles*, 1854, 2 Sm. & G. 147). As to the liability of the drawer of a cheque, and the acceptor or maker of a bill or note for losses occasioned by his negligently leaving a blank space in the document, see *Young v. Grote*, 1827, 4 Bing. 252; *Scholfield v. Londesborough* [1895], 1 Q. B. 536; [1896], App. Cas. 514, both cited under **BANKER AND CUSTOMER**.

**Blank Indorsement.**—A bill, note, or cheque payable to order is indorsed in blank when the payee writes his name on the back of it without specifying a fresh payee (Bills of Exchange Act, 1882, s. 34 (1)). It may be converted into a special indorsement by any holder writing above the indorser's signature a direction to pay the bill (etc.) to, or to the order of, himself or some other person (s. 34 (4)). Thus if on the back of a cheque payable to A. B. or order, A. B. writes his name and hands the cheque to C. D., the cheque is indorsed in blank, and it is then payable to bearer (s. 34 (1)), but C. D. may write above A. B.'s name "pay X. Y.," and the bill thereupon becomes payable only to X. Y. or his order. See **BILLS OF EXCHANGE**.

**Blanks in Wills.**—Blank spaces or even a blank page in a will do not invalidate the will. Nor does a blank space which leaves a sentence incomplete (*Corneby v. Gibbons*, 1849, 1 Rob. Eccl. 705; *In re Kirby*, 1849, 1 Rob. Eccl. 609; *In bonis Wotton*, 1874, L. R. 3 P. & M. 159).

Where a blank which would leave a sentence incomplete is afterwards filled up with the same ink, it may be presumed to have been filled up before execution. This presumption may not arise if a different ink is used in filling up some of the blanks (*Birch v. Birch*, 1848, 1 Rob. Eccl. 675; *Grerville v. Tylce*, 1851, 7 Moo. P. C. 320; *In bonis Cadge*, 1868, L. R. 1 P. & M. 543).

Where words in a will are after execution obliterated either by striking them out with a pen, or by erasure, or by pasting a piece of paper over them, the result is that a blank is caused in the will so far as the obliterated words are not apparent (see sec. 21 of the Wills Act, 1 Vict. c. 26; *In bonis Ibbetson*, 1839, 2 Curt. 337; *Townley v. Watson*, 1844, 3 Curt. 761).

To determine whether the original is apparent or not, the Court will hold the will up to the light and use magnifying glasses, but it will not employ chemicals or remove any substance from the will (*In bonis Horsford*, 1874, L. R. 3 P. & M. 211; *Efrench v. Combe* [1894], Prob. 191).

If, however, there is anything to raise a presumption that the original was intended to be erased only if the substituted words were effectual, the case becomes one of dependent relative revocation, and the Court will use any available means to ascertain the original, whether by removing strips of paper from the will, using chemicals or otherwise. For instance, when the amount of a legacy was pasted over with a piece of paper on which another amount was written, the Court presumed that the intention was to revoke the portion covered up only if the other bequest was effectually substituted, and accordingly removed the paper from the will (*In bonis Horsford*, 1874, L. R. 3 P. & M. 211).

For the purpose of construing a will, no evidence is admissible to supply blanks (*Baylis v. A.-G.*, 1741, 2 Atk. 239; *Hurst v. Hort*, 1791, 3 Bro. C. C. 311; *Taylor v. Richardson*, 1853, 2 Dr. 16).

But in some cases the Court has found enough in the will to enable it to supply the blank (*In re Harrison, Turner v. Hellard*, 1885, 30 Ch. D. 390).

If a testator mentions some purposes and leaves a blank for others, the gift may be valid so far as the purposes mentioned are concerned (*In re White, White v. White* [1893], 2 Ch. 41; *In re Macduff, Macduff v. Macduff* [1896], 2 Ch. 451).

Similarly, if certain objects are named, excluding or including persons whose names are left in blank, the gift to the named objects may take effect (*Iltingworth v. Cooke*, 1851, 9 Hare, 37; *Gill v. Bayster*, 1866, L. R. 2 Eq. 746; see *Greig v. Martin*, 1850, 5 Jur. N. S. 329). Jarman on *Wills*, 1893; Theobald on *Wills*, 4th ed.

**Blasphemy.**—It is blasphemy to publish any profane words vilifying or ridiculing God, Jesus Christ, the Holy Ghost, the Old or New Testament, or Christianity in general, with intent to shock and insult believers, or to pervert or mislead the ignorant and unwary. This intent is an essential element in the offence, though it may be presumed whenever such a result is the natural and necessary consequence of the publication. To speak, or write and publish, such words with that intent, is a misdemeanour at common law; proceedings may be taken against the offender either by indictment or by criminal information; and on conviction he is liable to fine and imprisonment to any extent in the discretion of the Court. Formerly he was liable also to be banished or put in the pillory; while in Scotland until 1813 the punishment was in certain circumstances death. The defendant is not allowed to plead any justification, or to argue at the trial that his blasphemous words are true.

Blasphemy is, of course, a *sin* as well as a *crime*: but with the sin the State has no concern. As Erskine, J., said, in sentencing G. J. Holyoake in 1842, "The arm of the law is not stretched out to protect the character of the Almighty; we do not assume to be the protectors of our God, but to protect the people from such indecent language." A crime is an act which affects other men perniciously, which destroys the peace and harmony of the community. And it is only when the interests of society require that the repetition of any such act should be prevented that the secular Court intervenes to secure that end by punishing the offender.

Now the harm that may result to the community from the publication of blasphemous words is twofold: In the first place, an immediate disturbance and breach of the peace may follow the utterance of such words; a demonstration may be made either for or against the speaker, which may lead to riot and disorder. And the probability of such a demonstration will depend largely upon the tone and manner, rather than the matter, of the address. In the second place, it was feared—perhaps with less reason—that the public utterance of such words will undermine religion and subvert the public morals, and "destroy those obligations whereby civil society is bound together." But where no danger to the State can reasonably be apprehended, no crime has been committed.

This is abundantly clear when one reads the two earliest cases on the subject in which the King's Bench first assumed jurisdiction over blasphemous words, *Atwood's case*, 1618; and *Taylor's case*, 1676. In the first of these the language complained of was aimed chiefly at the established mode of worship. The Court, at first, in Easter Term, 1618, doubted if they had any jurisdiction, as the words did not clearly tend to a breach of the peace. The Attorney-General, Sir Henry Yelverton, thought the case

ought to go before the Ecclesiastical Court of High Commission (Cro. (2) 421). But the King's Bench, in Michaelmas Term, decided that the indictment lay; "for these words are seditious words against the State of our Church and against the peace of the realm, and although they are spiritual words, still they draw after them a temporal consequence, namely, the disturbance of the peace" (2 Rolle's *Abridgment*, 78).

In the second case (*R. v. Taylor*) the language used was much coarser. It was proved that Taylor had preached aloud in the market-place at Guildford wild tirades against God and religion (e.g. "Christ is a Bastard and Religion is a Cheat") till one almost doubts his sanity. The information, which is set out in full in Tremayne's *Entries*, p. 226, alleged, among other things, that these words tended to destroy Christian government and society. It was, no doubt, argued on behalf of Taylor (as it was in the earlier case of Atwood) that the offence was punishable only in the spiritual Court. But "Hale said that such kind of wicked, blasphemous words were not only an offence to God and religion, but a crime against the laws, State, and government, and therefore punishable in this Court; for to say religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved; and Christianity (*q.v.*) is parcel of the laws of England, and therefore to reproach the Christian religion is to speak in subversion of the law" (1 Ventris, 293). Or, as his words are more briefly given in the report in 3 Keble, at p. 607: "Hale, C. J. These words though of ecclesiastical cognisance yet that 'Religion is a cheat' tends to dissolution of all government, and therefore punishable here, and so of contumelious reproaches of God or the religion established."

When we consider the date at which this judgment was delivered (1676), and remember how mighty a part religious fanaticism had played in the social disturbances of the earlier part of the century, it cannot be said that the decision in *Taylor's* case was wrong either in fact or in law. The judgment is expressly limited to "such kind of blasphemous words" as the prisoner was charged with uttering; and all that the Court decided was this: "Such words are not only a sin, but a crime. It may be they are punishable in the ecclesiastical Court; but they are also punishable in a temporal Court; for they tend to subvert the established order of things, of which Christianity is a part, and are therefore dangerous to the State. They are, in fact, seditious." And as though to make the grounds of their decision clear beyond all doubt, the Court condemned Taylor, as part of his punishment, to stand in the pillory both at Westminster Palace yard and also at Guildford, where he spoke the words, with a paper fixed to his head with these words written on it in large letters: "For Blasphemous Words tending to the Subversion of all Government" (Tremayne, 226; 3 Keble, 621).

But when we come to the days of George II. the point of view has somewhat changed. The danger to the State is still urged as the ground for prosecution; but stress is laid on the pernicious nature of the opinions expressed rather than on the probability of any immediate disturbance of the peace. Cp. the case of *R. v. Woolston*, tried before the King's Bench in 1729 (Fitz-G. 64; 1 Barn. Ch. 162, 266; 2 Stra. 832).

Woolston was a Fellow of Sidney College, Cambridge, who had published six "Discourses on the Miracles of our Saviour," urging that they were not to be taken literally, but allegorically or mystically. For this book he was prosecuted and found guilty of blasphemy. The indictment against him contained an express allegation that these discourses were published "with an intent to vilify and subvert the Christian religion." And Raymond, C. J., declared that "Christianity in general is parcel of the common law of

England, and therefore to be protected by it. Now, whatever strikes at the very root of Christianity tends manifestly to a dissolution of the civil government. So that to say an attempt to subvert the established religion is not punishable by those laws upon which it is established, is an absurdity. I would have it taken notice of that we do not meddle with any differences in opinion, and that we interpose only where the very root of Christianity itself is struck at, as it plainly is by this allegorical scheme, the New Testament and the whole relation of the life and miracles of Christ being denied; and who can find this allegory?"

But now at the end of the nineteenth century, we know by practical experience that such a book as Woolston's does not produce the consequences which Lord Raymond dreaded. To doubt the literal accuracy of the Gospel narrative of the miracles does not "tend manifestly to a dissolution of the civil government." It was perhaps natural in those days that the Chief Justice should anticipate such a result; but we have since tried universal toleration and found it beneficial. It is to the public interest that heretical opinions should be freely advanced and fairly answered, without unnecessary irreverence. If any man has discovered what he honestly believes to be a valuable truth, it is right that he should publish it to the world, provided he does so *bonâ fide*, and in calm and temperate language. This was clearly and boldly stated by one of the greatest of our judges in 1767: "The common law of England, which is only common reason or usage, knows of no prosecution for mere opinions" (per Lord Mansfield, C. J., in *Evans v. The Chamberlain of London*, 2 Burn, *Ecc. Law*, 218). Or, as Mr. Justice Erskine said in the House of Lords in 1842 (*Shore v. Wilson*, 9 Cl. & Fin. at p. 524): "It is indeed still blasphemy, punishable at common law, scoffingly or irreverently to ridicule or impugn the doctrines of the Christian faith; yet any man may, without subjecting himself to any penal consequences, soberly and reverently examine and question the truth of those doctrines which have been assumed as essential to it."

For *heresy* (*q.v.*) is no crime. Heresy is not blasphemy. It differs from blasphemy entirely, both in essence and in its legal aspect. Heresy is the deliberate adoption of religious views which the Church or State deems erroneous. It was an ecclesiastical offence for a heretic obstinately to cling to his convictions after his error had been pointed out to him; if he refused to recant, he was bidden to do penance for the good of his soul. But the secular Courts took no cognisance of any man's religious opinions. And though many statutes were passed from time to time in the fifteenth and sixteenth centuries by which heresy was made a crime and punishable by death, all these statutes were repealed in 1558. And now heresy is purely an ecclesiastical offence, and punishable only in a clergyman. "At this day," writes Sir Edward Coke in 1609, "no person can be indicted or impeached for heresy before any temporal judge, or other that hath temporal jurisdiction" (12 Rep. 57).

Again, *nonconformity* (see NONCONFORMIST) is no crime; it is not in a layman even an ecclesiastical offence. By the 4th section of the Toleration Act (1 Will. & Mary, c. 18), no dissenter shall be prosecuted in any ecclesiastical Court for or by reason of his nonconformity to the Church of England. And although by sec. 17 it was provided that the benefits of the Act should not extend to Unitarians, this exception was repealed in 1813 by the Statute 53 Geo. III. c. 160.

• Whether *apostasy* (*q.v.*) can still be regarded as in any sense a crime depends on whether the Statute 9 & 10 Will. III. c. 35, is still law. It subjects to certain penalties anyone, who "having been educated in, or at any time

having made profession of, the Christian religion within this realm, shall by writing, printing, teaching, or advised speaking, assert or maintain that there are more gods than one, or shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority." But the statute is practically, if not actually, obsolete, and the sooner it is repealed the better. There is no single instance recorded of a prosecution under it.

This much, at all events, is clear: that it is not criminal or illegal now to preach Unitarianism or Judaism. "I apprehend," says Mr. Justice Coleridge in *Shore v. Wilson*, 1842, 9 Cl. & Fin. at p. 539, "that there is nothing unlawful at common law in reverently denying doctrines parcel of Christianity, however fundamental."

Legacies to Unitarian chapels, to the Unitarian Association, to maintain a Unitarian missionary, and "towards the support of the Unitarians," have been upheld and enforced in equity (*Shrewsbury v. Hornby*, 1846, 5 Hare 406; *In re Barnett*, 1860, 29 L. J. Ch. 871; *General Assembly of General Baptist Churches v. Taylor*, 1841, 3 Dunlop & Bell, 1030). Hence the advocacy of Unitarian doctrines cannot be a crime. So trusts and legacies in favour of Jewish synagogues, and to promote the propagation of Judaism, are valid (see *Lazarus v. Simmonds*, 1818, 3 Mer. 393, *n.*, and 9 & 10 Vict. c. 59). Hence the dicta in *R. v. Woolston* cannot now be accepted as good law. In *Thornton v. Howe*, 1862, 31 Beav. 14, a trust for "printing, publishing, and propagating the sacred writings of the late Joanna Southcote" was held good by Romilly, M. R.; and in *Parc v. Clegg*, 1861, 29 Beav. 589, the same learned judge held that there was nothing illegal or immoral in a society whose chief object was to propagate the visionary doctrines of the late Robert Owen.

Is it possible, then, to draw the line at atheism? If a man were to publicly assert that there was no God, would that be a criminal offence, although the assertion were made seriously and modestly, in the honest desire to arrive at the truth, and without any intention to shock and insult the religious feelings of others? It is thought not. Atheists have sat in Parliament; the law has been altered to allow their evidence on affirmation (*q.v.*) to be received in our Courts (see 1 & 2 Vict. c. 105, s. 1; 32 & 33 Vict. c. 68, s. 4; 33 & 34 Vict. c. 49, s. 1). To hold such opinions (if anyone really does) is no crime; to avow such opinions cannot be a crime, provided the avowal be not made with levity and in a scoffing spirit, but honestly and conscientiously, and with no more profanity than is necessarily involved in such a statement. It is true that in a recent civil case (*Pankhurst v. Thompson*, 1886, 3 T. L. R. 199) Baron Huddleston was inclined to hold that to say merely "there is no God" is *prima facie* blasphemy. But the case was settled; so that it was unnecessary for the Court to deliver any judgment. While in *R. v. Ramsey and Foote*, 1883, 48 L. T. 739, 15 Cox C. C. 231, Lord Coleridge distinctly laid down this rule: "If the decencies of controversy are observed, even the fundamentals of religion may be attacked without a person being guilty of blasphemous libel."

Hence we arrive at this general conclusion: that a man commits no crime who avows any doctrines which he sincerely believes to be true—that he may fearlessly preach and promulgate such doctrines, however heretical others may deem them—provided he advances his arguments in a grave, earnest, and temperate tone, and with a sincere desire of ascertaining or disseminating the truth. "The law visits not the honest errors, but the malice of mankind" (Starkie on *Libel*, 2nd ed., p. 147). It places no barrier in the way of the freest inquiry, or of the largest intellectual or



spiritual progress. It only interferes where our religious feelings are insulted and outraged by wanton and unnecessary profanity; and there surely it is right that some provision should exist to prevent such an offence to the highest and noblest instincts of our nature.

The intent to shock and insult believers, to corrupt the public morals, and to bring religion into hatred and contempt, is thus of the essence of the crime of blasphemy. Whether such an intent in fact existed is always a question of fact for the jury, and the *onus* of proving it lies on the prosecution. The best evidence of such an intention is usually to be found in the work itself. If it is full of scurrilous and opprobrious language, if sacred subjects are treated with offensive levity, if indiscriminate abuse is employed instead of argument, if the writer has deliberately had resort to sophistical arguments, if he has wilfully misrepresented facts within his knowledge, or indulged in sneers and scoffs against all that is good and noble, then a malicious design to wound the religious sensibilities of others may be readily inferred. But where the work is free from all offensive levity, scoffing, and sophistry, and is, in fact, the honest and temperate expression of religious opinions conscientiously held and avowed, the author is not guilty of blasphemy, however heretical those opinions may be. Mere vehemence, or even virulence of argument, must not be taken as evidence of an intent to injure. Sarcasm and ridicule are fair weapons, even in heterodox hands, so long as they do not degenerate into profane scoffing or irreverent levity.

This is the law laid down, in the latest prosecution for blasphemy, by the late Lord Chief Justice (*R. v. Ramsey and Foote*, 1883, *supra*), and the view which is now generally accepted as good law. It is not universally accepted, however. See the remarks of Huddleston, B., in *Pankhurst v. Thompson*, 1886, 3 T. L. R. 199. Mr. Justice Stephen, too, in his *History of the Criminal Law of England*, vol. ii. p. 474, favours a somewhat different view. He contends that "the true legal doctrine upon the subject is that blasphemy consists in the character of the matter published, and not in the manner in which it is stated"; though he admits that "there is no doubt some authority in favour of a different view of the law." But in a former work, *The Digest of Criminal Law* (p. 97), Mr. Justice Stephen placed his present definition of the law, and that given by Lord Coleridge, in parallel columns, as equally good law, adding in a note: "There is authority for each of these views. Most of the cases are old, and I do not think that, in fact, anyone has been convicted of blasphemy in modern times for a mere decent expression of disbelief in Christianity."

The view taken by Lord Coleridge is certainly opposed to the *dicta*, if not also to the decision, in *R. v. Woolston*, *sup.* But a judge is not bound to adopt an erroneous view expressed by a predecessor on a question, not of law, but of public policy. It is also contrary to the decision in *Cowan v. Milbourn*, 1867, L. R. 2 Ex. 230. In that case the Court of Exchequer (Kelly, C. B., Martin and Bramwell, BB.) decided that the defendant was justified in refusing to carry out a contract to let his rooms to the plaintiff, because the plaintiff proposed to deliver in them lectures, the titles of two of which were advertised as follows:—"The Character and Teachings of Christ; the former defective, the latter misleading"; "The Bible shown to be no more inspired than any other Book." The lectures never were delivered, and the arguments intended to be adduced in them could only be conjectured from the titles given on the placards. Yet Kelly, C. B., held that it was clear from the advertisements that the lecturer was going to attack Christianity in general, and that to do this publicly was clearly blasphemy at common

law. **Baron Martin** relied entirely on some assumed right of property in the landlord. **Baron Bramwell**, on the other hand, relied on the Statute 9 & 10 Will. III. c. 35 (*ante*, p. 174), as there was some evidence that the plaintiff had been educated in, or made profession of, the Christian religion. But at the end of his judgment he seems to abandon this ground, and to admit that possibly the lecture was not positively criminal, in the sense that the law would punish it, while maintaining that it still was unlawful as being *contra bonos mores*. The decision is really no authority on a point of criminal law, as the matter was not fully argued; the Court merely refused an *ex parte* application for a rule *nisi* in a civil case in which only £20 was in dispute.

On the other hand, there is strong authority in favour of Lord Coleridge's statement of the law. His father, the late Mr. Justice Coleridge, directed the jury to precisely the same effect in the case of *R. v. Pooley*, tried at Bodmin Summer Assizes in 1857. And in the House of Lords he said (9 Cl. & Fin. at p. 539): "The only safe, and, as it seems to me, practical rule, is that which I have pointed at, and which depends on the sobriety and reverence and seriousness with which the teaching or believing, however erroneous, are maintained." Mr. Justice Best gave a similar direction to the jury in the case of *R. v. Mary Ann Carlile* (1821, 1 St. Tri. N. S. at pp. 1046, 1047). So did Mr. Justice Erskine in *R. v. Adams* and *R. v. Holyoake* in 1842. The law laid down by all the judges in *Shore v. Wilson* (*Lady Hewley's case*, 1842, 9 Cl. & Fin. 355) is in entire accord with Lord Coleridge's view, and than this there can be no higher authority. The law laid down in *Shore v. Wilson* and in *R. v. Ramsey and Foote* is, therefore, it is concluded, at all events "the better opinion," and it is the only law on the subject which it is possible to enforce in the present day—the only law which is consonant with our modern ideas of universal toleration and religious equality.

**Bleaching and Dyeing.**—Bleaching and dyeing works come within the statutory definition of non-textile factories (41 Vict. c. 16, s. 93). Such works are therefore subject to all the provisions of the Factory Acts applicable to non-textile factories (see FACTORIES AND WORKSHOPS), with certain exceptions here noted. The hours of employment and regulations for children, young persons and women, and the times allowed for meals, are to be the same as if the works were a textile factory (s. 40). In the process of Turkey-red dyeing, young persons and women may be employed on Saturdays beyond the time ordinarily prescribed (s. 47); they may also be employed at any time to prevent any damage which may arise from spontaneous combustion in the process of Turkey-red dyeing, or from any extraordinary atmospheric influence in the process of open-air bleaching (s. 55).

Cleaning and dyeing processes are often carried on with the aid of chemicals liable to evolve noxious gases, and so are brought within the purview of the special legislation applicable to chemical works. See CHEMICAL PROCESS.

**Blended Fund.**—A direction to sell real estate coupled with the blending into one fund of the proceeds of the real and personal estates of a testator by his will, is regarded as a circumstance tending to indicate an intention to convert the whole in any event so as to make the whole pass

under the will by the description of personal estate (see Lewin on *Trusts*, 9th ed., p. 167). Where realty and personalty are once for all blended together and directed to be converted, interests in the fund produced, which are undisposed of by the will, pass to the residuary legatee (see Theobald on *Wills*, 4th ed., p. 212). The leading cases for these propositions are *Durour v. Motteux*, 1749, 1 Ves. Sen. 320; and *Mallabar v. Mallabar*, Ca. t. Talb. 78. See the discussion of the former by Lord Eldon in his argument in *Ackroyd v. Smithson*, 2 White & Tudor's L. C., and the notes to the last cited case. See also *Spencer v. Wilson*, 1873, L. R. 16 Eq. 501; *Court v. Buckland*, 1876, 45 L. J. Ch. 214, and the cases there cited.

**Blockade.**—The blocking of a harbour, port, or sea-board by hostile ships in order to prevent ingress or egress, and by stopping the supply of provisions or ammunition, compel surrender without bombardment (*q.v.*) or siege (*q.v.*).

The right of the belligerent (*q.v.*) to establish a blockade is based on the right of sovereignty which the belligerent exercises over the territory of the enemy wherever he can do so. In other words, he closes the enemy's port to everybody, including neutrals, as the enemy himself would be entitled to do.

It is therefore not permissible to blockade straits or international rivers which serve as the necessary means of communication between neutrals. Thus the blockade of the mouth of the Danube by the Russians during the war of 1877–78 was unjustifiable according to international law.

By art. 24 of the Treaty of San Stefano (March 3, 1878), it is specifically provided that the Bosphorus and Dardanelles shall remain open in time of war as in time of peace to the merchant vessels of neutral States, on their way to or from Russian ports. It is also specifically provided by the convention of Constantinople (1888) concerning the Suez Canal that it shall never be blockaded, and that no act of war shall be committed in it or its ports, nor within three miles thereof.

The practice of States as regards the mode in which a blockade must be exercised in order to be binding upon neutrals is not yet identical, though certain limitations in the exercise of the right of blockade are now universally acknowledged.

Thus the fourth article of the Declaration of Paris (*q.v.*), stating that "blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy," and intended to give a final sanction to the abolition of "fictitious" or "paper" blockades, may now be considered as a universally admitted principle of international law. (See for history of paper blockades, Fauchille, *Du blocus Maritime*, 1882; Martens, *Recueil des traités de la Russie*, t. xi.)

Jurists are practically agreed that a blockade to be in accordance with international law must fulfil the following conditions:—

1. It must be ordered by the responsible authority of the belligerent power;
2. It must be brought to the knowledge of the neutral whom it concerns; and
3. It must be maintained with forces sufficient to prevent its being violated.

The first of these conditions follows from the principle, that States only know each other through their official representatives.

As regards the second, it is usual to give the notice to the local authorities of the blockaded place, and also through the diplomatic channel to the neutral Powers.

The question of what constitutes a proper general notification to the latter has given rise to controversy. In the Crimean War the notifications by Great Britain were minute in all particulars. On the proclamation of the blockade of the coast of the Southern by the Northern States in the American Civil War, Lord Lyons, on behalf of Great Britain, pointed out to the United States Government "the extreme vagueness of the information" given, and asked if precise notices would be issued for each southern port as soon as the actual blockade commenced. The United States Government replied that "the practice of the United States was not to issue such notices, but to notify the blockade individually to each vessel approaching the blockading port, and to inscribe a memorandum of the notice having been given on the ship's papers. No vessel was liable to seizure which had not been individually warned. The fact of there being blockading ships present to give the warning was the best notice and best proof that the port was actually and effectively blockaded." The "individual" notification of the blockade was also followed by France in the Franco-German War. The practice of France is to consider (1) that a general notification is not sufficient of itself to warrant the conclusion that neutrals knew of the existence of a blockade; and (2) that in order that the blockade, with all its consequences, may become legally binding, the usual diplomatic notification must be completed in each particular case, by a special notification to neutrals who present themselves at the line of the blockade; in other words, the diplomatic notification is considered neither essential nor obligatory, but the special notification is absolutely so. (Hautefeuille, *Des droits et devoirs des nations neutres*, 1858, 2nd ed., vol. ii. p. 223; *Repertoire générale alphabétique du droit français*, 1891, vol. viii., "Blocus.")

The view of jurists as laid down by the Institute of International Law seems to imply the necessity of a diplomatic notification, which "must not only define its limits in latitude and longitude, and the precise moment of its commencement, but also state the time granted to merchant vessels for unloading, re-lading, and leaving the port." (*Règlement des prises*, 1882, 1883, and 1887, arts. 7 and 36.)

"The commander of the blockade," adds the Institute, "must, moreover, give notice of it to the authorities and consuls at the blockaded place. The same formalities are necessary after the re-establishment of a blockade which may have ceased to be effective, or when the blockade is extended to new places. (*Règlement des prises*, art. 37.)

The period fixed by Great Britain and France in the notification for neutral vessels to withdraw from the blockaded ports during the Crimean War was fifteen days. This was also the time granted by the United States during the Civil War. That granted by France, when she blockaded the Baltic ports during the Franco-German War, was ten days. Ten to fifteen days may, in fact, be considered the usual period in current practice, unless exceptional circumstances, as where the port is at some distance up a river subject to the blockade, require it to be longer.

As regards the third point, a neutral vessel cannot be held liable to the penalties of violation of the blockade, if it at any time ceases to be effectively enforced. This follows from the Declaration of Paris (*q.v.*), and has been laid down as a principle in the articles of the Institute of International Law in the following form:—

"A blockade after having been declared and notified, is effective when there exists an imminent danger in entering or leaving the blockaded port by a sufficient number of warships, either in station or only momentarily absent from their station.

"If the blockading squadron depart from their station for any motive other than exigencies of weather, the blockade may be considered as having ceased, and must then be declared and notified anew." (*Règlement des prises*, arts. 35 and 38.)

The British Government expressed its view of the meaning of the fourth article of the Declaration of Paris in two letters to the British minister at Washington during the American Civil War.

"It appears," wrote Earl Russell on February 15, 1852, "from the reports received from Her Majesty's naval officers, that although a sufficient blockading force is stationed off those ports, various ships have successfully eluded the blockade; a question might therefore be raised as to whether such a blockade should be considered as effective. Her Majesty's Government, however, are of opinion that, assuming that the blockade is duly notified, and also that a number of ships is stationed and remains at the entrance of a port, sufficient really to prevent access to it, or to create an evident danger of entering or leaving it, and that these ships do not voluntarily permit ingress or egress, the fact that various ships may have successfully escaped through it (as in particular instances here referred to) will not of itself prevent the blockade from being an effective one by international law. The adequacy of the force to maintain a blockade being always and necessarily a matter of fact and evidence, and one as to which different opinions may be entertained, a neutral State ought to exercise the greatest caution with reference to the disregard of a *de facto* and notified blockade; and ought not to disregard it except when it entertains a conviction, which is shared by neutrals generally having an interest in the matter, that the power of blockade is abused by a State either unable to institute or maintain it, or unwilling from some motive or other to do so."

The representative of the Confederate States having protested against this interpretation, Earl Russell wrote on February 10, 1863, that he saw no reason to qualify the statements he had already made. It appeared "to H.M. Government to be sufficiently clear that the Declaration of Paris could not be intended to mean that a port must be so blockaded as really to prevent access in all winds, and independently of whether the communication might be carried on in a dark night, or by means of small low steamers or coasting craft creeping along the shore, in short, that it was necessary that communication with a port under blockade should be utterly and absolutely impossible under any circumstances. In further illustration of this remark, I may say there is no doubt that a blockade would be in legal existence although a sudden storm or change of wind occasionally blew off the blockading squadron. This is a change to which in the nature of things every blockade is liable. Such an accident does not suspend, much less break, a blockade. Whereas, on the contrary, the driving off a blockading force by a superior force does break a blockade which must be renewed *de novo* in the usual form to be binding upon neutrals. . . . The adequacy of the force to maintain the blockade must indeed always to a certain extent be one of fact and evidence; but it does not appear that in any of the numerous cases brought before the Prize Courts in America the inadequacy of the force has been urged by those who would have been most interested in urging it against the legality of the seizure."

As regards the notification of cessation of a blockade,

"There are two sorts of blockade," said Sir William Scott (*The Neptunus*, 1799, 1 Rob. C. 171), "one by the simple fact only, the other by a notification accompanied with the fact. In the former case, when the fact ceases (otherwise than by accident or the shifting of the wind) there is immediately an end of the blockade: but where the fact is accompanied by a public notification from the Government of a belligerent country to neutral Governments, I apprehend, *primâ facie*, the blockade must be supposed to exist till it has been publicly repealed. It is the duty undoubtedly of a belligerent country which has made the notification of blockade, to notify in the same way and immediately the discontinuance of it; to suffer the fact to cease, and to apply the notification again at a distant time, would be a fraud on neutral nations, and a conduct which we are not to suppose any country would pursue. . . . I shall hold that a blockade by notification is, *primâ facie*, to be presumed to continue till the notification is revoked."

The right of excluding all neutral ships from the blockaded ports is usually waived as a matter of courtesy for neutral ships of war; otherwise breach of the blockade in principle entails confiscation of ship and cargo.

The practice of the British Courts as regards the liability of the cargo was laid down with a minute examination of the authorities by Lord Kingsdown in his judgment in the *Panaghia Rhomba* case (1856, 12 Moo. P. C. C. 168).

"In the case of *The Mercurius* (1798, 1 Rob. C. 80)," he said, "Lord Stowell seems to have thought that the owners of cargo were not bound by the act of the master without their authority; and the judgment seems rather to warrant the marginal note which the very learned reporter has stated as the effect of it, namely, 'Violation of blockade by the master affects the ship but not the cargo, unless the property of the same owner or unless the owner is cognisant of the intended violation.' Now in the present case Dr. Lushington has stated his conviction that the owners of the cargo were innocent of all knowledge of the intended violation; and if, therefore, the law remained as it is to be collected from the case of *The Mercurius*, their Lordships would have great difficulty in assenting to the decision now under review. But the subsequent cases appear to have carried the rule much further, and to have established that when the blockade was known or might have been known to the owners of the cargo at the time when the shipment was made, and they might therefore by possibility be privy to an intention of violating the blockade, such privy shall be assumed an irresistible inference of law, and it shall not be competent to them to rebut it by evidence; that in cases of blockade for the purpose of affecting the cargo with the rights of the belligerent, the master shall be treated as the agent for the cargo as well as for the ship. This is the result of the cases cited by Dr. Lushington in his judgment, and the additional authorities mentioned at the bar. In the case of *The Alexander* (4 Rob. C. 94), which occurred in 1801, Lord Stowell held that in cases of breach of blockade the Court must infer 'that the ship going in fraudulently is going in the service of the cargo with the knowledge and by the direction of the owner.' In the case of *The Adonis*, which occurred in 1804, he went a step further, and held not only that such inference must be made, but that (with the exception to which we have already referred) the owners could not be let in to prove a contrary intention. This case was affirmed upon appeal, and it possesses therefore all the authority which the decisions of the tribunal of a single country can give in a law in which all civilised coun-

tries are concerned. The same doctrine is laid down by the same great judge in the case of *The Exchange* (1 Edw. A. R. 41) in 1808, and in *The James Cook* (1 Edw. A. R. 261) in 1810. We find therefore a series of authorities establishing a general rule, which, like all general rules, may in its application to particular cases be occasionally attended with hardship, but which nevertheless may be necessary to prevent fraud, and may on the whole promote the purposes of justice. It is a rule not applicable exclusively to neutrals, but applies with equal force to all persons attempting to violate a blockade, though they may be the subjects or the allies of the country which has established it. The propriety or rather the necessity of these rules is rested by Lord Stowell on the notoriety of the fact that in almost all cases of breach of blockade, the attempt is made for the benefit, and with the privity, of the owners of the cargo; that if they were at liberty to allege their innocence of the act of the master it would always be easy to manufacture evidence for the purpose, which the captors would have no means of disproving; and that in order to make a blockade effectual, it is essential to hold the cargo responsible to the blockading power for the act of the master to whom the control over it has been intrusted, leaving the owners to seek their remedy against the master or the owners of the ship, if in reality the penalty was incurred without any privity on their part."

The *Pacific Blockade* is an institution of recent origin, and, as the name implies, is not an operation of war. It is a measure of coercion employed by maritime Powers able to bring into action such vastly larger forces than the resisting State can dispose of that resistance is out of the question. In 1827, the first case recorded, the combined squadrons of Great Britain, France, and Russia blockaded a portion of the Turkish coast. Since then a number of such blockades have been resorted to by Great Britain or France: against Portugal (1831), New Granada (1836), Mexico (1838), La Plata (1838-40 and 1845-48), Greece (1850), Brazil (1862), and China (1884). Greece in 1886 was blockaded by Great Britain, Austria, Germany, Italy, and Russia to prevent her people from possibly plunging Europe into war. Lastly, Great Britain, Germany, Italy, and Portugal blockaded Zanzibar in 1888, and *cp.* the blockade of Crete by the Powers in 1897. The Zanzibar case was peculiar, being directed not against the reigning authority, but against a slave trade he was powerless to stop.

There has been controversy as to whether the blockading Power has the right to confiscate, and whether it has the right to arrest vessels of States not belonging to the blockaded country. France has leaned to an assimilation of pacific blockades to those practised by belligerents (see correspondence between Lord Granville and M. Waddington, *Parl. Papers*, France, No. 1, 1885), and Great Britain to the view that a pacific blockade must be confined in its effects to the State blockaded. The blockade of Greece in 1886 is probably the most authoritative precedent, owing to the number of Powers in whose name it was effected, to its distinctly "pacific" character, and to its effectiveness in producing the result aimed at, and it was effected without confiscation even of ships belonging to the blockaded country. The British instructions were to detain any ship under the Greek flag entering or issuing from any of the blockaded ports, but not ships under a neutral flag, and even Greek ships if any part of the cargo on board of such ships belonged to any subject or citizen of any foreign Power other than Greece, and other than the blockading Powers, if shipped "before notification of the blockade or after such notification, but under a charter made before the notification." The rules adopted by the Institute of International Law in the following year (1887) show the jurists and the most recent practice to

be in harmony. These rules, which will probably be followed in future as backed by the larger weight of authority, are as follow:—

1. Vessels under a foreign flag may freely enter in spite of the blockade.

2. A pacific blockade must be officially declared and notified, and must be maintained by a sufficient force.

3. Vessels of the blockaded Power which do not respect such a blockade may be sequestered. The blockade having ceased, they must be restored with their cargoes to their owners, but without compensation of any kind.

[See Harleck, *Interl. Law*, 1893; Wheaton, *Interl. Law*, 1889.]

### **Blood, Corruption of.**—See **ATTAINDER**; **FORFEITURE**.

**Blood Relation.**—Persons descended from the same stock or ancestor are said to be blood relations. They may be related either lineally or collaterally; lineally where one is descended in a direct line from the other, as father and son, grandfather and grandson; collaterally where they are descended from the same stock, but not the one from the other, as uncle and nephew. In computing the degree of relationship between lineals, one degree is reckoned for each generation; in the collateral line English law sometimes follows the method of computation of the canon law, and sometimes the different method of the civil law. The rule of the canon law, in computing the degree of relationship between two persons, is to begin at the common ancestor and reckon downwards, and the degree in which the two persons, or the most remote of them, is distant from the common ancestor, is the degree in which they are related to each other; thus, brothers stand to each other in the first degree, uncle and nephew in the second. The rule of the civil law, on the other hand, is to count upwards from one of the persons to the common stock, and then downwards to the other person, excluding the common stock; thus brothers stand to each other in the second degree, uncle and nephew in the third degree. Under the Statute of Distributions the civil law rule is followed.

Persons may be related by the whole blood or half-blood. Kinsmen of the whole blood are derived from the same pair of ancestors, *e.g.* children of the same father and mother; kinsmen related by the half-blood are derived from one common ancestor only, *e.g.* children of the same father, but of different mothers. Children of the half-blood are sometimes distinguished as consanguinean or uterine, according as their common parent is father or mother. In the old law of inheritance the half-blood was totally excluded, but by the Inheritance Act, 1833, relations of the half-blood are admitted to succeed on the failure of relations in the same degree of the whole blood. In the distribution of an intestate's personal estate, the half-blood shares equally with the whole blood (2 Black. Com. pp. 202 *et seq.*; Williams, *Executors and Administrators*, 9th ed., vol. i. pp. 356 *et seq.*). As to prohibited degrees in relation to marriage, see titles **AFFINITY**; **CON-SANGUINITY**.

**Board of Agriculture.**—This Department was created in 1889 by the Board of Agriculture Act (52 & 53 Vict. c. 30). It consists of a President and of the Lord President of the Council, Her Majesty's Principal Secretaries of State, the First Commissioner of the Treasury, the



Chancellor of the Exchequer, the Chancellor of the Duchy of Lancaster, and the Secretary for Scotland. Its offices are at 4 Whitehall Place and 3 St. James's Square.

To this new body were transferred, in the first place, all the powers and duties of the Land Commissioners, which are most various and important; for they comprise all the work done formerly by the Tithe, the Copyhold, and the Inclosure Commissioners. The Tithe Commissioners were originally appointed in 1836 on the passing of the Tithe Act (6 & 7 Will. IV. c. 71), since which date there have been no less than twenty Acts passed relating to tithes. In 1841, when the Copyhold Act (4 & 5 Vict. c. 35) was passed, its administration was intrusted to commissioners, but it was provided that the Tithe Commissioners for the time being should be the Copyhold Commissioners. Four years later the Inclosure Act of 1845 (8 & 9 Vict. c. 118) was passed, and under its provisions Inclosure Commissioners were appointed, who were distinct from the Tithe and Copyhold Commissioners, and one of whom was to be the First Commissioner of Woods and Forests for the time being. The Land Drainage Act, passed in the following year (9 & 10 Vict. c. 101), was administered by the Inclosure Commissioners. There were thus two bodies of commissioners, until in the year 1851 they were merged into one by the 14 & 15 Vict. c. 53, and a single department was formed, presided over by officials who were styled Tithe, Copyhold, or Inclosure Commissioners, according to their respective functions. This arrangement existed for upwards of thirty years, until, on the passing of the Settled Land Act in 1882 (45 & 46 Vict. c. 38), the former titles disappeared, and the commissioners were thenceforward known as "The Land Commissioners for England." Finally, in 1889, the Land Commission was merged in the Board of Agriculture, and the title of Land Commissioners was abolished.

Under the Act of 1889, there were also transferred to the newly-formed Department the powers and duties of the Privy Council under the Destructive Insects Act, 1877 (40 & 41 Vict. c. 68), and the Contagious Diseases (Animals) Acts (which have since been consolidated by the Diseases of Animals Acts, 1894 (57 & 58 Vict. c. 57)), 1896, and power was given to the Board (s. 4) to make general or special orders for prescribing and regulating the muzzling of dogs, and the seizure, detention, and disposal (and, if need be, the slaughter) of stray dogs, and of dogs not muzzled or not under control. By the Act of 1889 (s. 2, subs. 1 (c)) the powers and duties of the Commissioners of H.M. Works and Public Buildings, under the Survey Act, 1870 (33 & 34 Vict. c. 13), were vested in the Board of Agriculture as from April 1, 1890. This involves the superintendence of the whole Ordnance Survey of Great Britain, Ireland, and the Isle of Man. Since 1889, various other functions have been assigned to the new Board. By an Order in Council, dated July 30, 1891, all the duties of the Board of Trade under the Corn Returns Act, 1882 (45 & 46 Vict. c. 37), were transferred to the Board of Agriculture under sec. 4 of the Act of 1889. Then, by the Fertilisers and Feeding Stuffs Act, 1893 (56 & 57 Vict. c. 56), ss. 4, 5, the Board of Agriculture is required to appoint a chief agricultural analyst, and to approve of the appointment by the county councils of district agricultural analysts, who shall report to the Board the result of every analysis made by them under the Act. And by sec. 7 of the same Act a certificate from the Board is made a condition precedent to certain prosecutions under the Act.

• By the Law of Commons Amendment Act, 1893 (56 & 57 Vict. c. 57), s. 2, it was provided that "an inclosure or approvement of any part of a common purporting to be made under the Statute of Merton and the

Statute of Westminster, the second, or either of such statutes, shall not be valid unless it is made with the consent of the Board of Agriculture." And last year, by the Light Railways Act, 1896 (59 & 60 Vict. c. 48), fresh duties are imposed on the Board of Agriculture under secs. 5, 19, and 21.

To facilitate the prompt discharge of these various duties, the work is divided into several branches:—

1. *Inclosure and Commons Branch*.—The Inclosure Acts, 1845 to 1882, are administered by this department. The Board will make no order for the inclosure of a common, unless it is satisfied that such inclosure is expedient, "having regard to the health, comfort, and convenience of the inhabitants of any cities, towns, villages, or populous places in or near" the land proposed to be inclosed, as well as to the advantage of the persons interested in the land. It prefers to make a provisional order for the regulation and maintenance of a common, under the Commons Act, 1876 (39 & 40 Vict. c. 56), and not for its inclosure. (See COMMONS.) To this branch is also assigned all work arising under the Metropolitan Commons Acts, 1866 to 1878, and the Law of Commons Amendment Act, 1893; all business connected with exchange and partition of land, and division of intermixed lands; with the application of compensation money paid by railway companies and other bodies in respect of commonable rights in land taken under the Lands Clauses Acts and other Acts; with the definition of lost boundaries of intermixed lands of different tenures; with the apportionment of fee-farm rents or other fixed payments charged on lands; with the remedy of defective proceedings under various Inclosure Acts; with all questions affecting recreation grounds and field-garden allotments, and commons and open spaces generally. The Board sanctions the sale, enfranchisement, and exchange of property of English universities and colleges, under the Universities and Colleges Estates Acts, 1858 to 1880; the re-investment of the money in the purchase of other lands or of securities, the sale of advowsons, the augmentation of benefices, the transfer of lands held in trust, and the raising of money by mortgage, or the application of moneys in the hands of the Board belonging to the universities and colleges, for improvements of the property, for the purchase of lessees' interests, and for compensation for loss of fines on the non-renewal of leases. The Board is also asked to approve of sales of glebe lands, under the Glebe Lands Act, 1888, and of proposals for the investment of the moneys arising therefrom.

2. *Copyhold and Tithe Branch*.—This department administers the Tithe Acts, 1836 to 1891; the Copyhold Acts, 1841 to 1894; the London (City) Tithes Act, 1879 (42 & 43 Vict. c. clxxvi.), and other Acts relating to tithes in the City of London; and in Halifax the redemption of rent-charges under the Extraordinary Tithe Redemption Act, 1886; and of quit-rents, chief-rents, rent-charge, and other perpetual annual sums issuing out of land, under sec. 45 of the Conveyancing and Law of Property Act, 1881. This involves much correspondence and inspection of documents, and the preparation and issue of appointments of valuers and umpires, extensions of time, appointments of trustees to receive enfranchisement money, certificates of title and of expenses, awards of enfranchisement, and certificates of exoneration.

3. *Survey, Land Improvement, and Land Drainage Branch*.—Here all draft plans are prepared, and all maps and schedules required for the due discharge of the work of the other branches are examined and recorded; the Ordnance Survey is superintended; all tithe and inclosure maps and awards, all orders of exchange, division, and partition safely preserved; and

all county, parish, and municipal boundaries accurately defined and recorded. To this department landowners make applications to improve and charge their estates, under the Improvement of Land Act, 1864 (as amended by the Settled Land Act, 1882); Limited Owners' Residences Acts (33 & 34 Vict. c. 56; 34 & 35 Vict. c. 84); Limited Owners' Reservoirs Act (40 & 41 Vict. c. 31); General Land Drainage and Improvement Company's Act (12 & 13 Vict. c. xci.); Lands Improvement Company's Acts (16 & 17 Vict. c. cliv.; 18 & 19 Vict. c. lxxxiv.; 22 & 23 Vict. c. lxxxii.; 26 & 27 Vict. c. cxl.); Scottish Drainage and Improvement Company's Acts (19 & 20 Vict. c. 70; 23 & 24 Vict. c. clxx.); Land Loan and Enfranchisement Company's Act (23 & 24 Vict. c. clxix.). To this branch is also assigned the duty of certifying the due execution of works of land improvement under the Settled Land Acts, and the amount payable for such works; and also of certifying, when requested, the period for which tenants for life shall maintain and repair improvement works at their own expense, and as to the insurance of the same. The Board is also called on in certain cases to appoint an umpire under the Agricultural Holdings (England) Act, 1883; to attend to matters arising under the Thames Valley Drainage Acts, 1871 to 1891, and the Somersetshire Drainage Act, 1877; and to business connected with arterial drainage under the Land Drainage Act, 1861, including the examination and determination of areas for new commissions of sewers and for special drainage districts; and to sanction the mortgage of rates to cover the expenses of the necessary work.

4. *Law Branch*.—In this branch very important work is done in advising upon all manner of legal questions arising in connection with the general work of the Board, and also under the Glebe Lands Act, 1888, and the Merchandise Marks Acts, in relation to agricultural or horticultural produce; and in advising on numerous questions of law submitted to the Board; in settling orders, regulations, and notices under the Diseases of Animals Act, 1894; the Corn Returns Act, 1882; the Markets and Fairs (Weighing of Cattle) Acts, 1887 and 1891; and the Fertilisers and Feeding Stuffs Act, 1893; notices and agreements under the Copyhold Act, 1894, 57 & 58 Vict. c. 46; rules under the Glebe Lands Act, 1888 (51 & 52 Vict. c. 20); also in advising on applications under sec. 81 of the Copyhold Act, 1894, and the Law of Commons Amendment Act, 1893, for the consent of the Board to grants of new copyholds or inclosure of waste; advising on and settling draft provisional orders, for the inclosure and regulation of commons and awards under the Inclosure Acts, and draft schemes under the Metropolitan Commons Act, and advising on and taking steps to procure the passing of Acts confirming such provisional orders and schemes; advising on by-laws in certain cases; examining and perusing all public and private Bills which may affect the work of the Board; and advising on Bills to be introduced into Parliament by the President of the Board of Agriculture.

5. *Animals Branch (Outdoor and Indoor)*.—In this department are administered the Markets and Fairs (Weighing of Cattle) Acts, 1887 and 1891, and the Diseases of Animals Acts, 1894 and 1896, which consolidated all previous Acts, for the suppression of diseases among animals in Great Britain. This involves the regulation of the landing and inspection of all foreign animals landed in this country; the inspection of cattle ships, landing-places, lairs, markets, auction marts, sale yards, railway stations, and cattle trucks. In this branch, too, the establishment returns are prepared, and also an annual report for Parliament.

6. *Intelligence Branch*.—Under subs. (3) of s. 2 of the Act of 1889, the

Board of Agriculture also makes, and aids others to make, inquiries, experiments, and research into all matters connected with agriculture and forestry, with the diseases of animals and with destructive insects, fungi, etc. It collects, notes, abstracts, and collates all information on such subjects contained in the English agricultural publications, in our blue-books, and in the official reports of the colonies and foreign countries; it summarises the contents of all analyses made under the Fertilisers and Feeding Stuffs Act, 1893; and the information thus obtained is published in the *Journal of the Board of Agriculture*.

7. *Educational Branch*.—By the same subsection of the Act of 1889, the Board of Agriculture was empowered to inspect and report on any schools—not being public elementary schools—in which technical instruction, practical or scientific, is given in any matter connected with agriculture or forestry. The Board can assist financially any school which admits such inspection, and which in the judgment of the Board is qualified to receive such aid. It also promotes agricultural education by aiding lectures or any other system of instruction connected with agriculture or forestry. It confers with county councils and other local bodies respecting their schemes of agricultural education, and advises them thereon; it inspects their work and reports to them thereon. It also inspects and reports on any examinations in agriculture or forestry.

8. *Statistical Branch*.—By subs. (2) of s. 2 of the Act of 1889, the Board of Agriculture was required to undertake the collection and preparation of statistics relating to agriculture and forestry, produce and prices. Here the corn returns are collected, tabulated, published in the *London Gazette*, weekly, quarterly, and annually; the local corn averages are calculated; and all returns as to the diseases of home animals, the importation of foreign animals, and the live weight and prices of cattle prepared.

9. There is also an *Accounts Branch* for the preparation of estimates, the recovery of loans, and the calculation of rent-charge tables.

**Board of Green Cloth** was originally the counting house of the royal household (*domus computus Hospitii Regis*), and received its name from the green cloth on the table at which its officers sat. Its original functions were—

1. To take (daily) the accounts for all the household expenses, and to pay these accounts and the wages of the royal servants;

2. To see to the good government of the household and servants;

3. To keep the peace within the verge, within which the Courts of common law had no jurisdiction. See VERGE.

4. To make provision for the household according to the laws and statutes of the realm. This duty gave them the management of the royal right of purveyance, which is now obsolete.

Under Acts of Hen. VIII., 27 Hen. VIII. c. 24, s. 10; 32 Hen. VIII. c. 20, s. 7, wherever the sovereign is in person, his steward, marshal, coroner, and all other his ministers shall and may keep their Courts for justice within the verge limited and accustomed to this Court during the time of his abode.

Under the Justices Qualification Act, 1744 (18 Geo. II. c. 20), the provisions regulating the qualification of justices are expressly declared not to exclude or incapacitate the officers of the Board of Green Cloth from being justices of the peace within the verge, thus recognising a certain amount of judicial authority, although Coke (4 *Inst.* 131) says the Court never held pleas.

Under the Coroners Act, 1887 (50 & 51 Vict. c. 55, s. 29), provision is made for the appointment and exclusive jurisdiction of a verge coroner to hold inquests where the sovereign is "demeurrant and abiding," and such coroner is still appointed by the Lord Steward. The police of the royal palaces are selected from constables of the Metropolitan Police Force sworn to execute the office of constable within the palaces and ten miles thereof (2 & 3 Vict. c. 47, s. 7), and offences within palaces are now cognisable before the Metropolitan police magistrates, being included within the boundaries of the Metropolitan Police Courts districts formed by Orders in Council under the Metropolitan Police Courts Acts, 1839 and 1840 (2 & 3 Vict. c. 71; 3 & 4 Vict. c. 84). A list of these orders is given in Appendix xix. to the 1893 Index of Statutory Rules and Orders. The Board, however, continues, in exercise of its first and second functions, as part of the Lord Steward's department, and is constituted of the Lord Steward and the Treasurer, Comptroller and Master of the Royal Household.

### **Board of Guardians.**—See GUARDIANS.

### **Board of Trade.**

#### THE CONSTITUTION OF THE BOARD OF TRADE.

The Board of Trade, although apparently an ordinary Government office directed by a single minister of State with the aid of a permanent staff, is, strictly speaking, a committee of the Privy Council, the president of which in theory has no greater administrative powers than his colleagues have. In actual practice the committee is a phantom committee (as in the parallel case of the Education Office), and the president is, in fact, the managing head of the department. The real connection between the Board of Trade and the Privy Council is now apparent only in certain formalities; as, for instance, on the appointment of a new president, or the entry of a new Ministry, when a minute of the Privy Council is made, recording the appointment, and the taking of the oath by the new president as president of "The Committee of Council for Trade"; and the fiction of a committee may still be seen in the form of the minutes by which the president does certain formal acts, such as the appointment of officers and clerks.

This discrepancy between the theoretical constitution and the actual working arrangement of the Board of Trade is explained by the fact that since its creation in 1786 it has changed by degrees from a consultative to an administrative or regulative body. Its predecessor, the Council for Trade and Plantations, fell into the lassitude which naturally besets a purely consultative body intermittently consulted. During its existence this Council was chiefly remarkable for having numbered both Locke and Gibbon among its members, and now its memory is kept alive solely by those invectives of Burke to which it owed its extinction. In 1782 it was, as the prelude to a later Act says, "utterly suppressed, abolished, and taken away"; but, as trade at that time was still considered to be somewhat of a political mystery, the new committee created in 1786, from which the present Board of Trade is directly descended, comprised high State officials whose qualifications were certainly not commercial. An Order in Council of 23rd August 1786 records that "His Majesty was this day pleased to revoke his Order in Council, bearing date the 5th day of March 1784, appointing a committee of Privy Council for the consideration of all matters relating to trade and

foreign plantations, and to declare the said committee dissolved. And His Majesty was pleased at the same time to appoint a new committee of Privy Council for the business above mentioned, and to declare that the Lord Archbishop of Canterbury, the First Lord Commissioner of the Treasury, the First Lord Commissioner of the Admiralty, His Majesty's Principal Secretaries of State, the Chancellor and Under-Treasurer of Exchequer, and the Speaker of the House of Commons should be members of the said committee. And that such of the Lords of His Majesty's Most Honourable Privy Council as shall hold any of the following offices, viz., The Chancellor of the Duchy of Lancaster, the Paymaster or Paymasters General of His Majesty's Forces, the Treasurer of His Majesty's Navy, and the Master of His Majesty's Mint, should be members of the said committee." And after adding to the committee some officers of the then existing Irish Parliament and ten other members, among whom were the Master of the Rolls and the Bishop of London, the minute concludes: "And His Majesty is hereby further pleased to order that the Right Hon. Lord Hawkesbury, Chancellor of the Duchy of Lancaster, and, in his absence the Right Hon. William Wyndham Grenville, be president of the said committee."

This Order in Council relates back to and is based upon an Act 22 Geo. III. c. 82 (1782), which therefore may be taken as the ultimate foundation on which the Board rests, and of which the 15th section enacts "That the duty and business done, or which might legally be done, by the late Commissioners of Trade and Plantations, and all authorities, powers, and jurisdictions given to the said Commissioners by any Act or Acts of Parliament may and shall be held or exercised under the former directions and trusts by any committee or committees of His Majesty's Privy Council which His Majesty shall be pleased to direct and appoint during His Royal pleasure, without any salary, fee, or pension to the members thereof for holding or exercising the same." This Act and the Order in Council explain the origin of the Board as a large committee, and during the early years of its existence its business was done by minutes passed at a Board, consisting of such members of the committee as chose to attend, the average attendance (according to the minute-books from 1786 to 1797) being seven or eight. As the president was the only member who was regularly present, and as he was quite competent to act alone (the Order in Council not requiring a quorum of the committee), the business naturally tended more and more to be drawn into the president's hands, more especially as the administrative functions of the Board began to arise. Accordingly, in 1826 a salary of £2000 was by 7 Geo. IV. c. 32, voted to the president, although his office rested solely upon the Order in Council, and had not been created by statute. Similarly, the first statutory mention of the vice-presidency is not its creation but a recognition of it as an already existing office, to which a similar salary was given. The only other statute which affects the constitution of the Board of Trade is one passed in 1867, with the object of further strengthening the efficiency of the office by the substitution of a parliamentary secretary for a vice-president. The latter had never been subordinate to the president, and was paid an equally high salary for discharging the duties, not of an active assistant but of an occasional deputy. Accordingly, by 30 & 31 Vict. c. 72, the vice-presidency was abolished, and a parliamentary secretary substituted with a salary of £2000, which in 1886 was reduced to £1200, being, like that of the president, paid out of annual votes. By these means the Board of Trade has been for working purposes assimilated to the other offices of State, and presents to the world the appearance of a permanent staff of officers under

a permanent secretary and two parliamentary chiefs, who change with the Ministry. But behind them there exists the dormant committee, "the hypothesis of a board"; and technically, no doubt, the Master of the Mint might be summoned to decide upon the seaworthiness of a Durham coaler, or the Archbishop of Canterbury to interpret the Petroleum Acts. The very subject of the responsibility of the members of the Board was raised in *Kain v. Farrer* (reported in the *Times*, April 1st-5th and May 8th-12th 1879), in which case it was contended that, for the purposes of the Merchant Shipping Act, 1854, the Board of Trade was constituted a sort of judicial tribunal, and that the powers given to it were not intended to be exercised by other than the particular persons composing the body to whom such powers were intrusted in the words of the Act, because the powers so given presupposed the exercise of personal judgment and discretion, and were never meant to be delegated to subordinates. For the Board, on the other hand, it was urged that the acts to be done (in that particular case, the inspection of a ship) were acts such as from their nature must be delegated, and that, if so done and afterwards ratified by the Board they became Board of Trade acts. The point in question was expressly left undecided; but Lord Coleridge incidentally says, "No doubt the whole Board, Bishop of London and all, could not be every day called together"; which shows that the existence of the committee is recognised. Indeed, it is possible to urge that the committee might be in certain cases responsible for costs; a contention which is rendered plausible by the presence of a special provision in 39 & 40 Vict. c. 80, s. 39, which declares that costs and compensation payable by the Board of Trade in pursuance of that Act may be paid out of monies provided by Parliament (*Thompson v. Farrer*, 1882, 9 Q. B. D. 383; *Dixon v. Farrer*, 17 Q. B. D. 660; *Dixon v. Farrer*, 1887, 18 Q. B. D. 52).

As to when the title "Board of Trade" became fixed, it is hardly possible to give an exact date; but the name is recognised by the Harbour Transfer Act, 1862, 25 & 26 Vict. c. 69, of which the interpretation clause says, "The term 'Board of Trade' shall be taken to mean the Lords of the Committee of Privy Council for the time being appointed for the consideration of matters relating to trade and foreign plantations." As the statutes with which the office deals have become gradually more and more numerous, the composition and also the status of the department has increased, though its constitution is unchanged. As to its composition, the permanent establishment, which in 1840 consisted of 30 persons at an annual cost of £14,716, had increased in 1853 to 66 persons, and in 1867 it consisted of 150 persons at an annual cost of £44,378; while in 1879 the cost was £62,816, and the staff had increased to 229. In 1892 the cost was £99,221.<sup>1</sup> As to the status of the office, Mr. W. E. Forster said in 1865, "Although this was a commercial country, the Board of Trade did not hold a position equivalent to the office of Minister of Commerce on the Continent. The office was looked upon in the family of the Cabinet somewhat in the light of a poor relation, and there was no regulation that its president must necessarily be a member of the Cabinet." But the select committee on trade with foreign nations which was appointed in 1864 expressly recommended "That the Board of Trade be placed more nearly upon an equality with the Foreign Office than it is at present . . . and that its chief be always a member of the Cabinet,"—a recommendation which since that date has been uniformly followed.

<sup>1</sup> The cost and staff of the Registrar-General of Seamen's Office, the Patent Office, and the Bankruptcy Offices are not included.

## GROWTH OF THE FUNCTIONS OF THE BOARD OF TRADE.

The new Committee of Trade and Plantations was at first, like its predecessor, purely consultative. It was a repository of knowledge on subjects connected with commerce; and its work was to advise the Foreign Office on commercial questions arising out of treaties with foreign States, to advise the Colonial Office as to the commercial Acts of Colonial Legislatures, the Treasury on questions of Customs and Excise, and the Privy Council Office as to grants of commercial charters by the Crown. It was, however, entirely within the discretion of those offices whether they should consult the Board at all, or act on its advice when obtained. In addition to this the Board collected and revised all statistics relating to trade, and made abstracts and digests of national statistics generally; one of its most remarkable duties being that of forecasting how much food the country was likely to require, and of regulating the supply accordingly by restriction or relaxation of the export and import of corn. The duty of preparing and superintending through Parliament the Bills arising out of the business of the department completes the account of the work of the office during the early years of the century.

The increase of commerce after the Napoleonic wars gave new vitality to the Board of Trade, and it was as president of that department that Huskisson in 1823 introduced his general amendments of the revenue laws in the direction of free trade; while the regulation of the silk duties by Deacon Hume still further identified the Board of Trade with that policy.<sup>1</sup> The reciprocity treaties of Sir Robert Peel were carried through with the assistance of the Board, and from the same office emanated the repeal of the navigation laws. This increased activity led to the establishment in 1832 of the Statistical Department, the earliest of the seven departments into which the Board is now divided.

In 1840 the first step was taken in the direction of what has turned out to be a complete revolution in the nature of the Board of Trade. Its history since that date is one of gradual change from a consultative to an administrative and regulative office. During the period from 1840 to 1871 it exercised consultative and regulative functions concurrently, or, to borrow a legal metaphor, it had a common law jurisdiction and a statutory jurisdiction; the latter quickly increasing, the former gradually dwindling. Since 1871 it has been practically an administrative office. The first birth of the statutory jurisdiction was in 1840, when by 3 & 4 Vict. c. 97, the Board was intrusted with the duty of settling and approving the by-laws of railway companies, for which purpose a second department was made. In 1846 and 1848 were added duties in connection with the inspection of passenger steamers, and upon the repeal of the navigation laws in 1850 a third department of the Board, the Marine Department, was established, to which branch was assigned the business under the quickly-multiplying Mercantile Marine Acts. In 1853 the regulation of lighthouses and pilotage was added to the new department, which had become so important that

<sup>1</sup> "In former times during the discussion of the Free Trade questions the Board of Trade, by bringing forward sound principles of political economy, rendered infinite service to the country in the promotion of commercial freedom."—Speech in the House of Commons by Mr. Milner Gibson in 1865 (Hansard, clxxvii., 1895). And Mr. John Morley, in his account of Mr. Villiers' motion in 1839 that petitions against the Corn Laws should be referred to a committee of the whole House, says: "The bewilderment of the Government was shown by the fact that Lord John Russell and Lord Palmerston went into the lobby with the Protectionists, while the President of the Board of Trade followed Mr. Villiers" (Morley's *Life of Cobden*, ch. vi.).



a fourth department, the Financial, was formed, having for its province the accounts and the administration of the funds of the entire office. During this, which we may call the second, period the consultative and administrative functions exist side by side; and an interesting light is thrown on the former by a speech of Earl Grey in the House of Lords in 1849 upon the proposed new constitution for the Australian colonies, when, in answer to a complaint by Lord Monteagle that the question had been referred to the Board of Trade, Earl Grey said: "He would remind their Lordships that from the earliest time it had been the practice of this country that questions relating to colonial government should be inquired into by the committees of the Privy Council; and, more than that, by this particular committee of Privy Council. They would find that from the first time we possessed colonies all the more important decisions of the Crown upon colonial questions had been always adopted on the report of this committee. . . . It still continued an invariable practice with respect to important questions for the Board of Trade and Plantations to advise the Crown in the form of a report. The greatest question of policy the Crown had to decide was whether colonial Acts should be allowed or disallowed. Those questions were invariably decided on in a report of the committee of Council and a committee of the Board of Trade and Plantations. The Secretary of State gave his opinion as a member of the Board in the form of a minute; but if the question was purely a colonial one, the Secretary of State gave his decision as a member of the Board of Trade and Plantations. . . . When Secretary at War he remembered to have sat with the noble lord as a member of the Board of Trade. A question with respect to the currency of Jamaica was referred to that committee, and the course adopted was at the suggestion of that committee. . . . In fact, every member of that committee, with one or two exceptions, was a member of the Executive Government; and he need not point out to them that any report presented by that committee would not be acted upon unless previously receiving the concurrence of the Secretary of State. . . . On different occasions there was a somewhat more formal proceeding adopted by the committee: they might call in witnesses, as they did in the case of the suppression of the slave trade, when they called and examined witnesses at considerable length as to the probable effects and consequences of the proposed measure, before the decision of the Government was finally taken and adopted." (Hansard, cvi. 1120.)

The increase in the administrative duties of the Board continued, especially in those of the Marine Department, and they were consolidated and further added to by the Merchant Shipping Act, 1854 (Parl. Pap. No. C. 1398 of 1876). The business had increased so much by 1866 that in that year the Marine Department was developed into three departments, viz. a reduced Marine Department, the Financial Department (which since 1850 had been a separate branch of the Marine Department), and a Harbour Department to which was committed the business connected with lighthouses, pilotage, harbours, and the physical adjuncts of navigation, and to which have since been added heterogeneous duties having no natural connection with any department.

Meanwhile there was a corresponding decrease in the consultative functions—and by 1865 the various Government offices, with the exception of the Foreign Office, had ceased to consult the Board. The year 1865 was a critical one for the Board of Trade, for in that year its consultative functions were condemned, and even the necessity of the separate existence of the Board was questioned. A parliamentary com-

mittee had been formed in 1864 to inquire into the arrangement between the Foreign Office and the Board of Trade in reference to the trade with foreign nations, in consequence of representations made by most of the chambers of commerce in the country, who felt that their interests were detrimentally affected by the double action of the two offices in foreign commercial matters.

The committee made three recommendations—"1. That the Board of Trade should be put more on an equality with the Foreign Office so as to give its opinions greater weight, and that its chief should be always a member of the Cabinet."

"2. That the Board of Trade should be put in direct communication with the diplomatic and consular services."

"3. That an officer or officers should be appointed in the Foreign Office to conduct its correspondence with the Board of Trade."

The second recommendation was at once negatived, and though the third was acted upon, the consultative function of the Board was generally disapproved of, Lord Sherbrooke (then Mr. Lowe) saying, "I can imagine no good purpose that it answers; and if I were disposed to concede that there is anything in the wants and necessities of the public service corresponding to the duties of the Board of Trade, I can imagine nothing worse than the principle of having a consultative department at all. Those who are responsible for the advice are not responsible for carrying it into action; those who are responsible for the acts are not responsible for the advice; and between the two no one is responsible." It was even suggested that the separate existence of the Board was unnecessary; but, as Mr. Goschen then pointed out, the work of the Board was very various, and as it would be impossible to make a new department for such matters as fisheries, art unions, copyright and trade marks, registration of designs, charters and companies, it was convenient to have "a heterogeneous department" like the Board of Trade to gather up all these miscellaneous questions. But though the administrative functions of the Board were allowed to continue and increase, the effect of this debate upon the Board as a consultative body was seen when in February 1872 Mr. Chichester Fortescue in answer to a question in the House said that "the main part of the business formerly conducted by the commercial secretary of the Board of Trade, consisting of reports to other departments of the Government, and especially to the Foreign Office, had greatly fallen off of late years, and had become insufficient to occupy the time of such an officer. It was therefore proposed to establish a new department at the Foreign Office for that purpose." This marks the disappearance of the consultative business as a distinct part of the work of the Board. It was in 1872 merged in the Statistical (thenceforward known as the Statistical and Commercial) Department, which thereby became the only survival in practice of the original committee of 1786.

The third period, therefore, may be dated from 1872 onwards, during which period the Board of Trade has been an administrative and regulative office. Since that date the five then existing departments have been increased to seven by the foundation of the Bankruptcy Department in 1883 (after legislation which originated in the Statistical and Commercial Department), and by that of the Fisheries Department, to which the previous powers and duties of the Home Office under the then existing Salmon and Freshwater Fisheries Acts were transferred in 1886.

## THE VARIOUS DEPARTMENTS.

I. *Statistical and Commercial Department.*

The Statistical and Commercial Department advises other offices if they ask to be advised, and this business has of late years shown a tendency to revive. Its business also includes the preparation of statistical abstracts both of the United Kingdom and the colonies, monthly and annual accounts of shipping and navigation, statistics as to labour, railways, cotton, and emigration, and also returns of tariffs and other matters called for from time to time by the Government and in Parliament. This department also is charged with the publication of statistics of wages, with special reference to hours of labour, the state of the labour market, the condition of the working classes, and price of commodities; and also with statistics of trade unions and of strikes and lock-outs, as to which an annual report is to be published. These inquiries are conducted by a labour correspondent (appointed in 1886), and a more recently created labour statistician. This department also edits the *Board of Trade Journal* (started in 1886), dealing with tariff and trade notices, with quarantine and post office notices of importance, and with periodical returns, such as corn cotton and fishery statistics.

The following are the Acts administered by this department:—

1868. 31 & 32 Vict. c. 33.	Cotton Statistics Act.
1871. 34 & 35 Vict. c. 78.	Regulation of Railways Act.
1872. 35 & 36 Vict. c. 73 (s. 10).	Merchant Shipping Act.
1896. 59 & 60 Vict. c. 30.	Conciliation Act.

II. *Railway Department.*

By the Railway Regulation Act, 1840, and the succeeding Acts, very extensive duties have been imposed on this department, among them being the inspection of railways and their works before they are opened to the public, and the inquiry into accidents as they occur. The reporting to Parliament on level crossings, and on the tolls, rates, and duties proposed in railway, canal, dock, etc. bills, and on the increase of rates, forms part of its business, as well as the approval of by-laws of railway and other companies, the grant of compulsory power to railways to enter on land, the appointment of arbitrators and umpires, etc. It has also power to grant certificates in certain cases for making railways and for raising additional capital, and, further, has many duties under private Railway Acts.

In 1846 a separate Board of Railway Commissioners (one of whom was the President of the Board of Trade) was constituted by 9 & 10 Vict. c. 105, and, though its powers were transferred back to the Board in 1851 (14 & 15 Vict. c. 64), the power of deciding many disputed points which were formerly referred to the Board (or to arbitrators appointed by it) was once more transferred to an external authority in 1873 on the establishment of the Railway Commissioners Court. Under the Railway and Canal Traffic Act, 1888, the Commissioners were superseded, and their jurisdiction, together with new and extended functions, was given to the now existing Railway and Canal Commission. The same Act assigned to the Board of Trade new duties affecting railways and canals, including the revision of the maximum rates and charges and the classification of traffic of railway and canal companies, and provisional orders embodying the results of such revision are framed by this department and submitted to Parliament for confirmation. Another important branch of its work is the making of

regulations for controlling the use of steam and other forms of mechanical power on street tramways, the inspection of tramways and the approval of their by-laws, and also the preparation and introduction into Parliament of provisional orders relating to new tramways, gas, water, and electric lighting. Further, the Electric Lighting Act, 1882, intrusts to this department the granting to local authorities and companies of provisional orders<sup>1</sup> and licences, under which there devolves on the department the duty of making and imposing regulations for the protection of public safety and of approving the system on which energy is to be supplied; and similar regulations and conditions for securing public safety are imposed on the owners or users of wires placed or erected without statutory powers for the purpose of supplying energy. Certain duties not obviously connected with locomotion also fall on the railway department, such as the control of various matters connected with the metropolitan gas companies; and under the provisions of 46 & 47 Vict. c. 57, the control of the duties relating to patents, designs, and trade marks, previously administered by the Commissioners of Patents, was transferred to the Board of Trade. The Patent Office is in charge of the comptroller-general of patents, who is assisted by a staff of technical and clerical officers. The amending Act of 1888 provides for the establishment of a register of patent agents, and empowers the Board of Trade to make general rules for giving effect to such provision.

The Joint-Stock Companies Registration Office is under this department. Government business with regard to copyright and merchandise marks (official prosecutions for infringement) falls also to this department, and an outlying province of its jurisdiction is concerned with art unions and industrial exhibitions.

Annual returns, and such special returns as may be ordered by Parliament from time to time with regard to the business of the department, are compiled by the staff.

The department administers the following Acts:—

1840. 3 & 4 Vict. c. 97.	An Act for Regulating Railways.
1850. 13 & 14 Vict. c. 83.	Railways Abandonment Act.
1851. 14 & 15 Vict. c. 64.	An Act to repeal 9 & 10 Vict. c. 105.
1854. 17 & 18 Vict. c. 31.	Railway and Canal Traffic Act.
1858. 21 & 22 Vict. c. 75.	Cheap Trains Act.
1859. 22 & 23 Vict. c. 59.	Railway Companies Arbitration Act.
1860. 23 & 24 Vict. c. 125.	Gas (Metropolis) Act.
1862. 25 & 26 Vict. c. 89.	Companies Act.
1863. 26 & 27 Vict. c. 33.	Inland Revenue Cheap Trains Act.
" " " 92.	Railway Clauses Act.
" " " 118.	Companies Clauses Act.
1864. 27 & 28 Vict. c. 120.	Railway Companies Powers Act.
" " " 121.	Railway Construction Facilities Act.
1866. 29 & 30 Vict. c. 108.	Railway Companies Securities Act.
1867. 30 & 31 Vict. c. 126.	Railway Companies (Scotland) Act.
" " " 127.	Railway Companies Act.
" " " 131.	Companies Act.
1868. 31 & 32 Vict. c. 119.	Regulation of Railways Act.
" " " 125.	City of London Gas Act.
" " " 154.	Lee Conservancy Act.
1870. 33 & 34 Vict. c. 19.	Railways Acts, 1864, Amendment Act.

<sup>1</sup> For the general powers of the Board of Trade in the granting of Provisional Orders, see May's *Parliamentary Practice*, 10th ed., pp. 654-659.

1870.	33 & 34	Vict. c.	70.	Gas and Waterworks Facilities Act.
	"	"	78.	Tramways Act.
1871.	34 & 35	Vict. c.	41.	Gasworks Clauses Act.
	"	"	78.	Regulation of Railways Act.
1873.	36 & 37	Vict. c.	48.	"
	"	"	76.	Railway Regulation (Signals) Act.
1874.	37 & 38	Vict. c.	40.	Board of Trade Arbitrations Act.
1877.	40 & 41	Vict. c.	26.	Companies Act.
1878.	41 & 42	Vict. c.	20.	Railway Returns (Continuous Brakes) Act.
1879.	42 & 43	Vict. c.	76.	Companies Act.
	"	"	193.	Tramway Orders Confirmation Act.
1882.	45 & 46	Vict. c.	56.	Electric Lighting Act.
1883.	46 & 47	Vict. c.	34.	Cheap Trains Act.
	"	"	57.	Patents, Designs, and Trade Marks.
1885.	48 & 49	Vict. c.	63.	" " " Amendment.
1886.	49 & 50	Vict. c.	37.	" " " "
1887.	50 & 51	Vict. c.	28.	Merchandise Marks.
1888.	51 & 52	Vict. c.	12.	Electric Lighting Amendment Act.
			25.	Railway and Canal Traffic Act.
			50.	Patents, Designs, & Trade Marks Amendment.
1889.	52 & 53	Vict. c.	57.	Regulation of Railways.
1890.	53 & 54	Vict. c.	13.	Electric Lighting (Scotland) Amendment Act.
1891.	54 & 55	Vict. c.	12.	Railway and Canal Traffic Amendment Act.
	"	"	15.	Merchandise Marks.
1892.	55 & 56	Vict. c.	44.	Railway and Canal Traffic Amendment.
1893.	56 & 57	Vict. c.	29.	Railways Regulation Act.
1894.	57 & 58	Vict. c.	19.	Merchandise Marks.
	"	"	54.	
1896.	59 & 60	Vict. c.	34.	Railways (Ireland) Act.
"	"	"	48.	Light Railways Act.
"	"	"	58.	West Highland Railway Guarantee Act.

### III. *Marine Department.*

The Marine Department was at one time the most heavily burdened section of the office, but the formation of the Harbour Department and the Finance Department has considerably lightened its duties, and the present business with which it is concerned is as follows:—

- (a) Mercantile marine offices and measures for prevention of crimping, for enrolment of apprentices to the sea service, and the engagement and discharge of seamen; the examination of masters, mates, and engineers in the merchant service, and of skippers and second hands in the fishing trade, and the issue of certificates of competency and service.
- (b) The health of crews, including inspection of crew spaces and provisions, medical inspection of seamen, and inquiries into cases of scurvy, etc., and deaths on board ship, and generally the discipline of merchant ships at home and abroad.
- (c) Tonnage admeasurement, national and international, the inspection of proving establishments for chain cables and anchors, survey of hull equipments and machinery of passenger steamers, the survey of emigrant ships and general administration of passenger Acts, also the detention of unseaworthy ships, and questions relating to deck loading and grain cargoes, and inspection of cattle ships.

- (d) Rule of the road at sea, ships' lights and fog signals, and signals of distress for ships, and the international code of signals.
- (e) Apparatus for saving life at sea, including life brigades and volunteer life-saving companies; grant of rewards for saving life at sea; investigations into wrecks, and into misconduct of masters, mates, and engineers, skippers and second hands; wreck register and statistics of wrecks and marine casualties at home and abroad.
- (f) Instructions to consuls and colonial officers in matters relating to ships and seamen; and miscellaneous questions affecting ships and seamen raised by correspondence with the Foreign Office, Colonial Office, India Office, etc., and by Colonial Acts and Ordinances.

In conjunction with the Admiralty this department manages the royal naval reserve, and with the aid of the Financial Department it investigates the relief and medical treatment of distressed seamen in foreign ports and British possessions abroad, including claims upon shipowners in respect of relief afforded abroad to distressed seamen.

The following Acts are in force concerning this department:—

1854. 17 & 18 Vict. c. 120.	Merchant Shipping Repeal Act.
1864. 27 & 28 Vict. c. 27.	Chain Cables and Anchors Act.
1867. 30 & 31 Vict. c. 124.	Merchant Shipping Act.
1871. 34 & 35 Vict. c. 101.	Chain Cables and Anchors Act.
1872. 35 & 36 Vict. c. 73.	Merchant Shipping Act.
1874. 37 & 38 Vict. c. 51.	Chain Cables and Anchors Act.
" 88.	Births and Deaths Registration Act.
1880. 43 & 44 Vict. c. 16.	Merchant Seamen (Wages and Rating) Act.
" 22.	Merchant Shipping (Fees and Expenses).
1882. 45 & 46 Vict. c. 22.	Boiler Explosions.
1883. 46 & 47 Vict. c. 22.	Sea Fisheries Act.
" 41.	Merchant Shipping (Fishing Boats).
1887. 50 & 51 Vict. c. 4.	" " " Amendment.
1890. 53 & 54 Vict. c. 35.	Boiler Explosions Amendment Act.
1891. 54 & 55 Vict. c. 31.	Mail Ships.
1894. 57 & 58 Vict. c. 60.	Merchant Shipping Act.
1896. 59 & 60 Vict. c. 12.	Derelict Vessels (Report) Act.

#### IV. *Harbour Department.*

The main duties of this department are concerned with—

- (a) The charge of the foreshores belonging to the Crown, and the charge of seeing that no injury is done to navigable harbours and channels.
- (b) Management of the harbours at Holyhead and Ramsgate, and any questions relating to commercial and fishing harbours which belong to Government; provisional orders under the General Pier and Harbour Acts, and under the Pilotage Acts, any questions relating to pilotage in the United Kingdom which belong to Government; and also the settlement of by-laws made by harbour authorities as to regulation of the shipment of explosives and petroleum; together with miscellaneous questions as to harbours and navigation arising in foreign parts, *e.g.*, Suez Canal, Alexandria.

- (c) Control over the lighthouse funds of the three general lighthouse authorities of the United Kingdom, and the management of such colonial lighthouses as are in the hands of the home Government.
- (d) Registry of British ships; wreck and salvage; and the consideration of applications to the Public Works Loan Commissioners for loans of public money for shipping purposes; also the giving notice to British shipping of all foreign quarantine regulations.
- (e) Examination of private Bills as to their effect on navigation, or on the title of the Crown in the foreshore and bed of the sea; and under private and local Acts, the appointment of arbitrators, engineers, and commissioners, and the consideration of works affecting tidal navigable waters.

Certain miscellaneous duties also fall to this department, such as the determination and adjustment of standards of measure and weight, duties under the Coinage Acts, and the Sale of Gas Acts, 1859-60, and also the Petroleum Act, 1879.

The following Acts passed since 1850 concern the Harbour Department:—

1851. 14 & 15 Vict. c. 49.	Preliminary Enquiries Act.
1853. 16 & 17 Vict. c. 131.	Merchant Shipping Law Amendment Act.
"     "     "     "     129.	Pilotage Law Amendment Act.
1854. 17 & 18 Vict. c. 44.	Regulation of Holyhead Harbour.
1857. 20 & 21 Vict. c. 147.	Thames Conservancy Act.
1860. 23 & 24 Vict. c. 152.	Tramways (Ireland) Act.
1861. 24 & 25 Vict. c. 47.	Harbours and Passing Tolls Act.
"     "     "     "     45.	General Piers and Harbours Act.
1862. 25 & 26 Vict. c. 19.	"     "     "     "     Amendment.
"     "     "     "     69.	Harbours Transfer Act.
1863. 26 & 27 Vict. c. 92.	Railway Clauses Act.
"     "     "     "     86.	Isle of Man Harbours Act.
1864. 27 & 28 Vict. c. 62.	"     "     "     "     Amendment.
1863. 26 & 27 Vict. c. 112.	Telegraphs Act.
"     "     "     "     71.	Harwich Harbour Act.
1864. 27 & 28 Vict. c. 102.	
1865. 28 & 29 Vict. c. 120.	
"     "     "     "     100.	Harbours Transfer Act.
1866. 29 & 30 Vict. c. 30.	Harbour Loans Act.
"     "     "     "     62.	Crown Lands Act.
1867. 30 & 31 Vict. c. 18.	Shipping Dues Exemption Act.
1870. 33 & 34 Vict. c. 10.	Coinage Act.
1871. 34 & 35 Vict. c. 105.	Petroleum Act.
1872. 35 & 36 Vict. c. 23.	Isle of Man Harbours Act.
"     "     "     "     55.	Basses Lights Act.
"     "     "     "     73.	Merchant Shipping Act.
1874. 37 & 38 Vict. c. 8.	Isle of Man Harbours Act.
"     "     "     "     40.	Board of Trade Arbitrations Act.
1875. 38 & 39 Vict. c. 17.	Explosives Act.
1878. 41 & 42 Vict. c. 49.	Weights and Measures Act.
1879. 42 & 43 Vict. c. 47.	Petroleum Act.
1881. 44 & 45 Vict. c. 38.	Public Works Loans Act.
1885. 48 & 49 Vict. c. 36.	Artillery Rifles Ranges Act.
"     "     "     "     49.	Submarine Telegraph Act.

1885. 48 & 49 Vict. c. 79.	Crown Lands Act.
1889. 52 & 53 Vict. c. 21.	Weights and Measures Act.
" " " 66.	Light Railways (Ireland) Act.
1890. 53 & 54 Vict. c. 52.	Railways (Ireland) Act.
1891. 54 & 55 Vict. c. 58.	Western Highlands and Islands Works Act.
" " " 72.	Coinage Act.
1892. 55 & 56 Vict. c. 18.	Weights and Measures (Purchase) Act.
" " " 59.	Electric Lighting and Telegraph.
1893. 56 & 57 Vict. c. 19.	Weights and Measures.

#### V. *Finance Department.*

This department deals with and presents to the Exchequer and Audit Department the accounts of the Board of Trade, and of its subordinate offices; also those of the Board of Trade Harbours, of the three Lighthouse Boards, of Colonial Lighthouses, of the superintendents of Mercantile Marine Offices, and of Receivers of Wreck. It also administers and deals with the merchant seamen's fund,\* pensions to merchant seamen, seamen's saving banks, seamen's money orders, wages and effects of deceased seamen, relief of distressed seamen; and in these matters the department not only keeps the accounts but controls the expenditure. It also receives, examines, and presents to Parliament the accounts of life assurance companies.

The Bankruptcy Acts, 1883 and 1890, and the Companies Winding-up Act, 1890, have placed the monies produced by the realisation of the estates of bankrupts and joint-stock companies which are in compulsory liquidation under the control of the Board of Trade, and the Finance Department has the custody of these funds.

The following Acts passed since 1850 throw business upon this department:—

1851. 14 & 15 Vict. c. 102.	Seamen's Fund Winding-up Act.
1853. 16 & 17 Vict. c. 131.	Merchant Shipping Law Amendment Act.
1869. 32 & 33 Vict. c. 44.	Greenwich Hospital Act.
1870. 33 & 34 Vict. c. 61.	Life Assurance Companies Act.
1871. 34 & 35 Vict. c. 58.	" " " Amendment Act.
1872. 35 & 36 Vict. c. 41.	" " " " " "
" " " 67.	Greenwich Hospital Act.
1883. 46 & 47 Vict. c. 52.	Bankruptcy Act.
1890. 53 & 54 Vict. c. 63.	Companies (Winding-up) Act.

#### VI. *Fisheries Department.*

This department was created in 1886 in compliance with the report of the commissioners appointed to inquire into the complaints made by line and drift net fishermen as to injuries sustained by them in their calling, owing to the use of the trawl net and beam trawl in the territorial waters of the United Kingdom. The Fisheries Department was intended to be a central authority to deal with matters relating to inland and sea fisheries, and its business includes the protection and preservation of the fisheries in inland and territorial waters, the carrying out of treaties and conventions with foreign Powers, and the collection of statistics.

The following are the recent Acts with which this department is concerned:—

1841. 4 & 5 Vict. c. lvii.	Pilchard Fishery, Cornwall.
1843. 6 & 7 Vict. c. 79.	Convention with France.



1861. 24 & 25 Vict. c. 109.	Salmon Fishery Act.
1863. 26 & 27 Vict. c. 10.	Salmon Acts Amendment Act.
1865. 28 & 29 Vict. c. 121.	Salmon Fishery Act.
1868. 31 & 32 Vict. c. 45.	Sea Fisheries Act.
1869. 32 & 33 Vict. c. 31.	Oyster and Mussel Fisheries Orders.
1870. 33 & 34 Vict. c. 33.	Salmon Acts Amendment Act.
1873. 36 & 37 Vict. c. 71.	Salmon Fishery Act.
1875. 38 & 39 Vict. c. 15.	Sea Fisheries Act.
" " " 18.	Sea Fishery Act.
1876. 39 & 40 Vict. c. 19.	Salmon Fishery Act.
" " " 34.	Elver Fishery Act.
1877. 40 & 41 Vict. c. 42.	Fisheries (Oyster, Crab, and Lobster) Act.
" " " 65.	Fisheries (Dynamite) Act.
" " " 98.	Norfolk and Suffolk Fisheries Act.
1878. 41 & 42 Vict. c. 39.	Freshwater Fisheries Act.
1879. 42 & 43 Vict. c. 26.	Salmon Fishery Law Amendment Act.
1881. 44 & 45 Vict. c. 11.	Clam and Bait Beds Act.
1883. 46 & 47 Vict. c. 22.	Sea Fisheries Act.
" " " 41.	Merchant Shipping (Fishery Boats) Act.
1884. 47 & 48 Vict. c. 11.	Freshwater Fisheries Act.
" " " 27.	Sea Fisheries Act.
1886. 49 & 50 Vict. c. 2.	Freshwater Fisheries Act.
" " " 39.	Salmon and Freshwater Fisheries Act.
1888. 51 & 52 Vict. c. 54.	Sea Fisheries Regulation Act.
1891. 54 & 55 Vict. c. 37.	Fisheries Act.
1892. 55 & 56 Vict. c. 50.	Salmon and Freshwater Fisheries Act.
1893. 56 & 57 Vict. c. 17.	Fishery (Sea) Act.
1894. 57 & 58 Vict. c. 26.	Sea Fisheries (Shell Fish) Regulation Act.
1896. 59 & 60 Vict. c. 18.	Fisheries (Norfolk and Suffolk) Act.

VII. *Bankruptcy Department*.—See BANKRUPTCY, vol. i. p. 512.

A central department of the Board of Trade, named the Bankruptcy Department, has been established under the 71st sec. of the Bankruptcy Act, 1883, the head of which office is called the Inspector-General in Bankruptcy. There are also attached to the High Court official receivers in bankruptcy; and each County Court on which bankruptcy jurisdiction has been conferred has one or more official receivers attached to it, each official receiver being, besides an officer of the Board of Trade, an officer of the Court to which he is attached.

The Companies Winding-up Act of 1890 applies to the winding-up of insolvent companies some of the leading principles of the bankruptcy law, namely, that of the official custody of the assets at the initial stage of the proceedings, with liberty to the creditors and contributories of the company to substitute at a later stage of the proceedings their own liquidator. The Act also applies to winding-up of companies another of the leading features of the Bankruptcy Acts, namely, that of an official investigation into the causes of failure and the conduct of those responsible for the trading and financial transactions which have brought about the losses to creditors and contributories caused by the insolvency. The Act also provides for a public examination to be held of promoters, directors, and officers; and provides for reports to be made similar in some respects to the reports upon the bankrupt's conduct and affairs under the Bankruptcy Acts. For the purpose of carrying into effect this change in the law relating to insolvent companies, official receivers are attached to the Courts which have winding-

up jurisdiction, and the Board of Trade are intrusted with a power of control over the accounts and proceedings of liquidators of companies similar to that which they exercise over trustees in bankruptcy.

Under the 25th sec. of the Bankruptcy Act, 1890, trustees under private deeds of arrangement are also under an obligation periodically to forward accounts to this department of the Board of Trade.

The following are the principal statutes with which the Bankruptcy Department deals:—

1883. 46 & 47 Vict. c. 52	Bankruptcy Act.
1884. 47 & 48 Vict. c. 9.	Bankruptcy Appeals (County Courts) Act.
1885. 48 & 49 Vict. c. 47	Bankruptcy (Office Accommodation) Act.
1886. 49 & 50 Vict. c. 12	" " "
1887. 50 & 51 Vict. c. 57	Deeds of Arrangement Act. "
" " " 66	Bankruptcy (Discharge and Closure) Act.
1888. 51 & 52 Vict. c. 62	Preferential Payments in Bankruptcy.
1890. 53 & 54 Vict. c. 71	Bankruptcy Act.
" " " 63	Companies (Winding-up) Act.

**Boarding House.**—The keeper of a boarding house must be distinguished from an innkeeper. The latter holds out his inn for the reception of all-comers, who are willing and able to pay an adequate price for the accommodation they receive. A boarding-house keeper receives his boarders by special agreement, and makes such bargain as he chooses as to the price to be paid him (see *Thompson v. Lacy*, 1820, 3 Barn. & Ald. 283; 22 R. R. 385; *Parkhurst v. Foster*, 1699, 1 Salk. 388; *Dansey v. Richardson*, 1854, 3 El. & Bl. 144). Unlike an innkeeper, a boarding-house keeper has no lien upon the goods of his boarders for rent or any other debt due in respect of the boarding. This follows from the fact that he does not carry on a "common employment," and it was assumed as undoubted law in *Thompson v. Lacy*, *supra*.

A boarding-house keeper does not warrant the safety of his boarders' property brought into the house (*Dansey v. Richardson*, *supra*). The extent of his liability for the loss—for instance, by theft—of such property was much debated in the case last cited and in *Holder v. Souby*, 1860, 8 C. B. N. S. 254. In the former case, the judges held that he was not liable in respect of a theft committed by his servant, unless some negligence of his own had conduced to the loss. The Court was divided upon the question whether negligence in engaging the guilty servant was sufficient or not to found such liability. In the latter case, the goods had been stolen by a stranger, who was admitted by the defendant to view the rooms which the plaintiff was about to leave, and it was held that the defendant was not liable for the loss, because he neither had received the goods as a bailee, nor had entered into any agreement to take care of them. The Court, however, expressed no doubt but that the defendant would have been liable for a loss due to his gross negligence or actual misfeasance. In the latest case on the subject, where the goods lost had been stolen by a servant, Cave J., directed the jury that the defendant was not bound to take active steps to protect the plaintiff's property, and would be liable for its loss only if that were due to some grave and improper conduct upon his (the defendant's) part, as, for instance, if he engaged a notorious felon as a servant (*Clench v. D'Arenberg*, 1883, 1 C. & E. 42). If property is taken charge of by the boarding-house keeper, he

is bound to take such care of it as a prudent man would take of his own property (*Ultzen v. Nickols* [1894], 1 Q. B. 92).

In the case of furnished lodgings or a furnished house, the landlord impliedly undertakes that the lodgings or house are reasonably fit for the purposes of the intended occupation (*Smith v. Marrable*, 1843, 11 Mee. & W. 5). This was settled in the case cited, which was a case of first impression, and all the reasoning there made use of applies to an agreement to take boarders. The undertaking is a condition of the agreement. The condition has been held to be unfulfilled where the house was uninhabitable because of the presence of bugs (*Smith v. Marrable, supra*; *Harrison v. Malet*, 1886, 3 T. L. R. 58), or defective drains (*Wilson v. Finch Hatton*, 1877, 2 Ex. D. 336), or infection from disease (*Bird v. Greville*, 1884, 1 C. & E. 317, measles). The condition applies only to the commencement of the tenancy, so that where during the occupation of lodgings the landlady's child fell ill of scarlatina, the doctrine of *Smith v. Marrable* was held not to apply (*Sarson v. Roberts*, 1895, 11 T. L. R. 515).

If the agreement for payment is that a lump sum be paid in respect of board and lodging, there is no right of distress for the recovery of such payment, but if the boarder is entitled to the exclusive occupation of a room (*Newman v. Anderton*, 1806, 2 N. R. 224), or part of a room (*Selby v. Greaves*, 1868, L. R. 3 C. P. 594; *Marshall v. Schofield*, 1882, 52 L. J. Q. B. 58), and an agreed rent is payable in respect of his occupation, such rent may be distrained for. See LODGER and LANDLORD AND TENANT.

Under the agreement for lodging the boarder is entitled to all the usual and necessary conveniences of a dwelling-house (*Underwood v. Burrows*, 1837, 7 Car. & P. 26).

An agreement for boarding is not an agreement for an interest in land within the Statute of Frauds, so as to require writing (*Wright v. Stavert*, 1860, 2 El. & El. 721).

See generally, INN and LODGER; and see also APARTMENTS.

**Boat.**—Boats are a necessary part of every ship's equipment, and a shipowner is liable criminally as well as civilly for any default in this respect. "The number and description of the boats, lifeboats, lifeboats, lifejackets, and lifebuoys to be carried by British ships according to the class in which they are arranged and the mode of their construction, also the equipments to be carried by the boats and rafts, and the methods to be provided to get the boats and other lifesaving appliances into the water, which methods may include oil for use in stormy weather," are laid down in rules made by the Board of Trade (*q. v.*) under sec. 427 of the Merchant Shipping Act, which are set out in Scrutton, *Merchant Shipping Act*, Appendix v. The penalty for breach of these statutory rules has a maximum of £50 in case of the master, and £100 in case of the owner (ss. 428, 430).

In the ordinary Lloyd's policy on ship, boats are included as part of the ship by name, but without such express mention, it seems, that, if carried in a usual manner, they will be included in the word "ship," as has been held in America (*Hall v. Ocean I. Co.*, 1839, 21 Pick. Mass. 472, Phillips, s. 465). It has been held that a policy in the ordinary form "on the body, tackle, apparel, munition, ordnance, boat, and other furniture of the ship" covers a boat, even if slung outside upon the quarter of the ship in a usual manner; and evidence was not allowed of a usage that if carried in this way it was not covered by the policy (*Blackett v. Roy. Ex. A. Co.*, 1832, 2 Crompt. & J. 250). Boats, like ships, have to carry lights at sea when being navigated. The

tenth article of the Regulations for preventing Collisions at Sea provides that open boats under way, when not having nets, trawls, dredges, or lines in the water, need not carry coloured sidelights, but must have a lantern with green and red glass sides ready to show on the deck to an approaching vessel; and while at anchor must carry an anchor light from sunset to sunrise. There are special statutes dealing with fishing and pilot boats. See FISHERIES; PILOTS.

**Bocland.**—Land in England, in Anglo-Saxon times, was divided into two main classes: bocland, or estates created by “book” or charter, and estates that were not so created. Bocland was of ecclesiastical, not of home, origin, and was created by grants of folc-land by the king with the consent of the witan (Kemble, *Saxons*, ii. 225; Stubbs, *Const. Hist.* i. 130). There is one instance on record where a grant, made by the king without the authority of the witan, was annulled (Kemble, *Codex Diplomaticus*, mxi. cclxlv.). At first these grants were made only to religious corporations; afterwards they were made to laymen, “ad construendum coenobium” (*Cod. Dipl.* lxxx.), or with some other religious condition attached. There was at least one attempt made to enforce the religious condition by retaking the estate on its non-fulfilment (*Cod. Dipl.* xlvi.); but Bede complains, in the eighth century, that the condition was not observed, and in the later “books” it does not appear. Alfred’s celebrated law, forbidding the alienation of “heir-land” from the kindred (Stubbs, *Select Charters*, p. 63), has been represented as the result of a reaction towards pure Teutonic principles (*Essays in Anglo-Saxon Laws*, pp. 70, 71); but this seems far-fetched, and the better opinion appears to be that it only shows that the restrictive clauses were often disregarded (Pollock, *Land Laws*, p. 200). As the power of the king grew, the number of grants increased, and a change occurred in the manner and wording of the grant. Cnut made grants of folc-land simply by writ, in the ordinary form, addressed to the shiremoot (*Cod. Dipl.* dcxxx. i. cclvii.), without the concurrence of the shiremoot; but there is only one case of a writ directed to the witan (*Cod. Dipl.* cclvi.). The exception became the rule in Edward the Confessor’s time. At first it is probable that the “book” was preceded or followed by a formal “livery of seisin”; later on by laying either the “book” or a piece of turf on the altar of the church to which the grant was made. The last instance of the latter custom is to be found in a forged charter of 799 A.D. (*Cod. Dipl.* xii. xxxvii. civ.). Afterwards the grant was made by the passing of the “book,” or by the exchange of deeds (*Cod. Dipl.* ccxx.). Such was the legal force of the “book” in Offa’s time that the holders of a “book” prevailed against those who were in actual possession (*Cod. Dipl.* clxiv.). Estates created by “book” could only be held in exact accordance with the terms of the written instrument: and when the terms were not observed, the estates were liable to forfeiture (*Cod. Dipl.* xlvi. cccvi. dcxli.). The “book” was divided into six parts: (1) the invocation, (2) the proem, (3) the grant, (4) the sanction, (5) the date, and (6) the teste (Kemble, *Cod. Dipl.* Intro. p. ix; see three specimens in Digby, *History of the Law of Real Property*). After Alfred’s time, the “books” were so much alike, that Kemble has suggested that blank forms were used, and the names of the grantees filled in. The only innovation that took place in the governing words was an occasional clause barring other charters. Every free man or woman—king, noble, religious corporation, or ecclesiastical or other dignitary—could own bocland. The rights conveyed varied

with the character of the charter, but in every case bocland was subject to the *trinoda necessitas* (Cnut's *Charter*, Digby, p. 98). The most usual estate conveyed was a fee-simple (*Cod. Dipl.* cxvii.), but occasionally it was an estate for life or lives, which would be usually renewed at the expiration of the term (Digby, p. 97). Other forms of limitation created estates in special tail (*Cod. Dipl.* cliii.), and in tail male (*Cod. Dipl.* cxlvii.). Bocland, according to Stubbs (*Const. Hist.* i. 77), "could be leased out by its holders, and under the name of *leanland* held by free cultivators"; but there seems to be only one example of a true leasehold estate, and that was after 1058 A.D. (Charter of a Three Years' Lease, *Cod. Dipl.* dccccxiv.). The remainders were in nearly all cases provided for, and cases of escheat, if they existed at all, were extremely rare, probably because the reversion lay in the grantor and his heirs. Marriage settlements, mortgages (*vide* two instances in *Cod. Dipl.* cccxcix. dxc.), and wills were also made by charter. Wills were, however, of late growth. Out of thirty-six extant examples, twenty-six occur after the beginning of Æthelred's reign, and of the twenty-six, sixteen are in Edward the Confessor's time. In the four instances of wills before 950 A.D., there is no mention of the royal permission or the payment of heriot. After that date, we find both. Every free man or woman could devise bocland by will, which was solemnly made before king and witan; but all lands of inheritance were not necessarily bocland (*Cod. Dipl.* ccxvii.). Bocland was usually translated, however, after Athelstan, as *terra testamentalis*. (For Latin equivalents, see Stubbs, *Const. Hist.* i. 76 note.) Thegn-land, reeve-land, etc., were grants of bocland made to private individuals for specific purposes. After the Norman Conquest bocland disappears. It is only once mentioned in *Domesday*, and the old "books" henceforward are only evidence of title. In the Norman charters, which took the place of "books," the religious clauses and the clause containing the consent of the witan disappear.

[Stubbs, *Const. Hist.* i., "Essays on Anglo-Saxon Laws"; Kemble, *Saxons* and *Cod. Dipl.*; Hallam, *Middle Ages*; Allen on the *Prerogative*; Elton, *Tenures of Kent*; Reeve, *English Law*; F. W. Maitland, *Domesday and Beyond*; Pollock, *Land Laws*; Pollock and Maitland, *History of English Law*; Andrews, *Old English Manor*.]

### **Bodily Fear.**—See MENACES.

**Bodily Harm.**—At common law there was no elaborate classification of assaults. They fell into common assaults and batteries, which were misdemeanours; and maims, which were felonies. See MAYHEM.

Under a series of enactments, now filed together in the Offences against the Person Act, 1861, 24 & 25 Vict. c. 100, elaborate provision is made for the punishment of a number of bodily injuries falling short of maiming.

(a) To cause any grievous bodily harm by any means whatsoever with intent to murder is felony, punishable by penal servitude for life or not less than three years, or imprisonment, with or without hard labour, for not over two years (24 & 25 Vict. c. 100, s. 11; 54 & 55 Vict. c. 69, s. 1).

(b) Unlawfully and maliciously to do or cause to be done any "grievous bodily harm" by the explosion of any explosive is felony, punishable as (a) (24 & 25 Vict. c. 100, s. 28).

(c) Unlawfully and maliciously exploding, or sending any explosive or throwing or applying corrosive fluids or destructive substances, with intent

(*inter alia*) to do "some *grievous* bodily harm," is felony, punishable as (a) (24 & 25 Vict. c. 100, s. 29; 54 & 55 Vict. c. 69, s. 1).

(d) Unlawfully and maliciously to place or throw an explosive into a building or ship with intent to do "*any* bodily injury" is a felony, punishable by penal servitude for three to fourteen years, or imprisonment as under (a) (24 & 25 Vict. c. 100, s. 30; 54 & 55 Vict. c. 69, s. 1).

Where offences (b) (c) (d) are committed by an offender under sixteen, the Court may also order him to be whipped (24 & 25 Vict. c. 100, ss. 28, 29, 30).

(e) To administer poison or any other destructive or noxious thing so as to inflict "*any grievous* bodily harm" is felony, punishable by penal servitude for three to ten years, or imprisonment as under (a) (24 & 25 Vict. c. 100, s. 23).

(f) Setting or causing to be set spring guns, man-traps or engines calculated to inflict "*grievous* bodily harm" with intent that, or whereby, the same may have such effect, is a misdemeanour, punishable by penal servitude for three to five years, or imprisonment as under (a) (24 & 25 Vict. c. 100, s. 31; 54 & 55 Vict. c. 69, s. 1).

(g) To inflict "*grievous* bodily harm" unlawfully and maliciously is a misdemeanour, punishable by penal servitude for from three to five years, or imprisonment as under (a) (24 & 25 Vict. c. 100, s. 20; 54 & 55 Vict. c. 69, s. 1).

(h) On conviction for indictment of an assault occasioning "*actual* bodily harm," the offender is liable to the same penalties as under (g) (24 & 25 Vict. c. 100, s. 47; 54 & 55 Vict. c. 69, s. 1). On such an indictment, the jury may convict of common assault only (*R. v. Yeadon*, 1861, L. & C. 81). The communication of venereal disease by husband to wife is not an offence against either (g) or (h) (*R. v. Clarence*, 1888, 22 Q. B. D. 23).

(i) A person who, having charge of any carriage or vehicle, by wanton or furious driving, or racing or other wilful misconduct, or by wilful neglect, does or causes to be done "*any* bodily harm," is guilty of misdemeanour, and liable to imprisonment for not over two years, with or without hard labour (24 & 25 Vict. c. 100, s. 35). This enactment applies to riders of bicycles or tricycles. See CYCLING, for law as to.

(k) A person who unlawfully and maliciously does or causes to be done "*any* bodily harm" to an apprentice or servant for whom he or she is legally liable, as master or mistress, to provide necessary food, clothing, or lodging (see APPRENTICE) is guilty of a misdemeanour, and liable to penal servitude for three to five years, or to imprisonment as under (i) (24 & 25 Vict. c. 100, s. 26; 54 & 55 Vict. c. 69, s. 1).

Of these offences, (a) (b) (c) are not, the rest are, triable at Quarter Sessions (5 & 6 Vict. 38, s. 1).

(l) Under the Children's Dangerous Performances Act, 1879 (42 & 43 Vict. c. 34, s. 3), where an accident causing actual bodily harm occurs to a child under fourteen in the course of a public exhibition or performance, which in its nature is dangerous to the life or limb of a child of such age, the employer is liable to conviction of assault (see ASSAULT); and if he is convicted on indictment the Court may order him to pay compensation not exceeding £20 to the child, or to some person named by the Court on his behalf, for the bodily harm so occasioned.

"Bodily harm" or "injury," and "actual" or "grievous" bodily harm are not defined in these statutes.

"*Actual*" bodily harm seems to mean "appreciable," as distinct from

"trivial" or "technical," injury, *i.e.* anything calculated to interfere with the health or comfort of the sufferer; and see ACTUAL BODILY HARM.

In the Indian Penal Code the term "hurt" is used as equivalent to "bodily harm," and is defined (s. 319) as meaning "bodily pain, disease, or infirmity"; and "grievous hurt," as distinct from "simple hurt," is defined (s. 320) as including (1) what in English law amounts to a maim, *i.e.* emasculation, permanent privation of the hearing of either ear or the sight of either eye, privation of any member or joint, and destruction or permanent impairing of the powers of any member or joint; (2) *permanent* disfigurement of head or face; (3) fracture or dislocation of a bone or tooth; (4) any hurt endangering life or causing the sufferer to be, during twenty days, in severe pain or unable to follow his ordinary pursuits.

This definition is adapted from that recommended by the Second Report of the English Criminal Law Commissioners, c. iii. art. 1, Parl. Pap., 1846. The injuries included in this definition all fall within the term "grievous bodily harm"; but, under the enactments consolidated by the Act of 1861, bodily harm, to be grievous, need not be permanent or dangerous, nor amount to disfigurement nor disablement, but must be such as seriously to interfere with health or comfort (*R. v. Cox*, 1818, Russ. & R. 362; *R. v. Ashman*, 1858, 1 F. & F. 88). Infection with disease is causing grievous or actual bodily harm (*R. v. Sinclair*, 1867, 13 Cox C. C. 28), but is not within the statute when the infection arises from carnal intercourse between man and wife (*R. v. Clarence*, 1888, 22 Q. B. D. 23).

It is said by Sir James Stephen, *Dig. Cr. Law*, 5th ed., arts. 225-270: (1) That any person may, for surgical purposes connected with the preservation of life or health, consent to the infliction of any bodily injury on himself, or on any child to whom he stands in *loco parentis*, and who is too young to exercise reasonable discretion. The injury must be within the reasonable limits of the consent given, its risks explained or understood, and it must be done with proper care or skill, otherwise the surgeon will be civilly or criminally liable (*Beatty v. Cullingworth*, C. A. [1897]; Beven, *Negligence*, 2nd ed., p. 1402).

(2) He also says that any person may also consent to the infliction on himself of any injury, not amounting to a maim (see MAYHEM), unless it is assented to or inflicted for a purpose or in a manner injurious to the public, or involving an actual and not a merely technical breach of the peace.

His opinions follow closely secs. 87-93 of the Indian Penal Code (see Mayne, *Ind. Cr. Law*, 1896, pp. 393-400), and are consistent with common sense, but do not in all respects embody any authoritative decision on the common law. Rule 2 is certainly established as to duelling (*R. v. Barronet*, 1852, 1 El. & Bl. 1), and as to prize fights (*R. v. Coney*, 1882, 8 Q. B. D. 534, and *R. v. Orton*, 1878, 14 Cox C. C. 226), but not apparently as to sporting matches or glove fights in private (*R. v. Young*, 1866, 10 Cox C. C. 371). In friendly contests with weapons, or games like football, the consent is to take the ordinary risks of the game, but not to serious bodily harm intentionally caused, even without breach of the rules of the game or of fair-play (1 East, P. C. 269; *R. v. Bradshaw*, 1878, 14 Cox C. C. 83).

All offences involving bodily injury to a child under the age of sixteen fall within the procedure clauses (12-17) of the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41).

[For further authorities, see 1 Hale, P. C. 473; Hawk., P. C., bk. 1. cc. 55, 56, 62; 1 East, P. C. 269; Greaves, *Crim. Law Con. Acts*; Archbold, *Cr. Pl.*, 21st ed., 723, 754, 765; 3 Russ. on *Crimes*, 6th ed., 279, 689; Mayne, *Ind. Cr. Law*, 1896, 154-160, 393-400, 580-585.]

**Body Corporate.**—See CORPORATION.

**Body, Dead.**—See CORPSE.

**Body of Deed.**—This phrase is sometimes used to denote the main or effective part of a deed as distinguished from the recitals. Thus in an ordinary conveyance of land the “body of the deed” consists of the statement of the consideration for the conveyance, the acknowledgment by the grantor of the receipt of the purchase money, the operative words of conveyance, parcels (which describe the property conveyed by the deed), the estate clause (if inserted), the habendum showing the estate to be holden by the grantee, and lastly such covenants as the special circumstances may require. See DEED.

**Boilers.**—By the Boiler Explosions Act, 1882 (45 & 46 Vict. c. 21), a “boiler” is defined to mean any closed vessel used for generating steam, or for heating water or other liquids, or into which steam is admitted for heating, steaming, boiling, or other similar purposes (s. 2). So a pipe conveying steam from a boiler outside to an engine inside a coal-mine was held within the definition (*R. v. Commissioners under the Boiler Explosions Act*, [1891], 1 Q. B. 703). The statute in question enacts that when a boiler explosion occurs notice thereof with certain particulars is to be sent to the Board of Trade within twenty-four hours, under a penalty, whereupon the Board is empowered to direct a preliminary inquiry as to the occurrence, and, if necessary, order a formal investigation before two commissioners (ss. 5, 6, 7). The only boilers now excepted from the operation of that enactment are those used in the Queen's service, or exclusively for domestic purposes (see 53 & 54 Vict. c. 35, s. 2), but boilers used to heat non-residential business premises are within the exception (*Smith v. Müller* [1894], 1 Q. B. 192). Inquiries may, therefore, be held even in the case of boiler explosions on steam ships certificated by the Board of Trade, and under circumstances within the provisions of the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), and the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58, s. 35). See *R. v. Commissioners under the Boiler Explosions Act*, *supra*. But in the case of explosions at sea the master or owner will be right in sending notice within twenty-four hours, or as soon thereafter as possible, except where notice has been sent in accordance with the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, ss. 385, 425). See also the Notice of Accidents Act, 1894 (57 & 58 Vict. c. 28); ACCIDENTS, NOTICE OF.

**Boiling Water** was held to be a destructive matter or thing, within 7 Will. IV. & 1 Vict. c. 85, s. 5 (*R. v. Crawford*, 1845, 1 Den. (r. C. 100)). That enactment was repealed by 24 & 25 Vict. c. 95, and reproduced, with modification, as 24 & 25 Vict. c. 100, s. 29, which substitutes the words “any destructive or explosive substance,” which are susceptible of the same meaning.

**Bolting.**—See INNS OF COURT.



**Bombardment** (from *bombarda* in mediæval Latin, an engine for throwing large stones), a continuous firing upon a place with artillery capable of destroying it.

The practice of international law on the subject may be summed up as follows:—

The same rules are applicable to bombardment by land as to bombardment by sea (*Rules on Bombardment*: "Annuaire de l'Institut de Droit International," 1896, pp. 313–315).

When a place is attacked or even defended, bombardment is a permissible operation of war. When a place is not defended, bombardment is unlawful unless under pressure of military necessity, and only exceptional circumstances can justify the bombardment of an open commercial port. The rule on this subject adopted by the Brussels International Conference on the rules of military warfare in 1874 is that—

"Fortified places alone are liable to be besieged. Towns, agglomerations of houses, or villages which are open and undefended, cannot be attacked or bombarded. But if a town or fortress, agglomeration of houses, or village be defended, the commander of the attacking forces should, before commencing a bombardment, and except in the case of surprise, do everything in his power to warn the authorities."

The rules adopted by the "Institut de Droit International" forbid the bombardment by a naval force of an open town, that is one not defended by fortifications or other means of attack or resistance for immediate defence or by detached forts situated near thereto, for instance at a maximum distance of from 4 to 10 kilometres (see "Annuaire de l'Institut," as above).

So far as military exigencies permit, the bombardment should be notified. On the bombardment of Paris without previous notice during the Franco-German War, the resident diplomatic body of the city addressed a remonstrance to the German Government. Prince Bismarck replied that such prior notification was neither required by the principles of international law, nor considered obligatory by military usage. It is generally agreed, however, by jurists that the besieger ought to give non-combatants an opportunity to leave the place.

The besieged commander should, by external signs plainly visible, indicate the position of places of worship, hospitals, asylums, museums, and libraries, and the then bombarding enemy should do its utmost to spare such buildings. But they must not be used for the purposes of war, and if so used their right to be spared ceases (see Rivier, *Droit des Gens*, Paris, 1896, vol. ii. p. 284).

**Bond.**—A bond is the acknowledgment of a debt in writing under the hand and seal of the debtor, who is then called the *obligor*. It must be delivered to the creditor, who becomes the *obligee*. Being under seal, it requires no consideration to support it, and the previous simple contract debt, if any, merges in the bond. A debt on a bond no longer has any priority over a simple contract debt in bankruptcy or in the administration of the assets of a deceased person; but it has this advantage, that it is not barred by the Statute of Limitations till twenty years have elapsed since its execution.

*Money-bonds.*—Bonds have usually a condition annexed to them to the effect that, on the person bound paying so much money, or doing some specified act, the bond shall be void. A bond without a condition is called a single bond: it is rarely met with now. When a bond is given to secure

the payment of money, the condition generally is that if the debtor pay the creditor on a day named a less sum (usually half the amount named on the face of the bond) with interest at a specified rate, then the bond shall be void, otherwise it shall remain in full force. Bonds with conditions of this kind are called "common money-bonds." In early days, if the condition was not performed to the letter, the whole penal sum on the face of the bond was at once recoverable. Then equity interfered, and prevented the creditor from recovering more than he was entitled to under the condition. And by a statute of the reign of Queen Anne (4 & 5 Anne, c. 16) it was provided that, in the case of a common money-bond, payment of the lesser sum with interest and costs shall be taken in full satisfaction of the bond, although such payment be not in strict accordance with the condition. But if the arrears of interest accumulate to such an amount as, together with the principal, to exceed the penalty of the bond, the creditor can claim no more than the penalty either at law (*Wilde v. Clarkson*, 1795, 6 T. R. 303; *Hatton v. Harris* [1892], App. Cas. 547) or in equity (*Clarke v. Seton*, 1801, 6 Ves. 411; *Hughes v. Wynne*, 1832, 1 Myl. & K. 20), except in special circumstances, as where the debtor has delayed the creditor by vexatious proceedings (*Grant v. Grant*, 1830, 3 Sim. 340).

*Action on a Common Money-bond.*—It was formerly the rule at common law for the plaintiff to claim on his declaration the whole penal sum, and leave the defendant to plead the condition, and its due performance in reduction of liability (see Stephen on *Pleading*, 7th ed., p. 32). But now the plaintiff invariably indorses his writ with a claim merely for the lesser sum named in the condition, with interest. Such a claim can be specially indorsed under Order 3, r. 6 (*Gerrard v. Clowes* [1892], 2 Q. B. 11). The date of the bond, the rate of interest reserved, and the period in respect of which interest is claimed should be stated in the indorsement.

*Bonds under 8 & 9 Will. III. c. 11.*—Besides the common money-bonds, bonds are frequently given, with conditions avoiding the bond on the due discharge of certain duties or the performance of other specified acts agreed to be done by the obligor. In such cases the law anciently was that, on the breach of any part of the condition, the whole penalty became due, and judgment and execution might be had thereon, subject only to the control of a Court of equity on an application to it for relief. But afterwards, in such cases, if the obligee sued on the bond, he was required, by the 8 & 9 Will. III. c. 11, s. 8, to state (or assign) the breaches which had been committed by the obligor (see the judgment of Parke, B., in *Grey v. Friar*, 1850, 15 Q. B. 891, 910; 19 L. J. Q. B. 393; and *Wheelhouse v. Ludbrooke*, 1858, 3 H. & N. 291); and, although judgment was still signed for the whole penalty, execution was allowed to issue only for the amount of the damages actually sustained in consequence of such breaches; the judgment remaining as a further security for the damages to be sustained by any future breach (*Hardy v. Bern*, 1794, 5 T. R. 636; *Hurst v. Jennings*, 1826, 5 Barn. & Cress. 650). A bond conditioned for the payment of a certain sum by instalments is within the statute of William III.; it is not a common money-bond within the statute of Anne (*Willoughby v. Swinton*, 1805, 6 East, 550).

*Action on a Bond within the Statute of William III.*—It is still open to the obligee of such a bond to claim the whole penal sum on his writ in the old common law way. But the more usual and proper method is for him to indorse his writ generally (e.g., "the plaintiff's claim is upon a bond conditioned not to carry on the trade of a —," or "upon a bond given to secure the payment of an annuity of £ —"; R. S. C. App. A. iii. 4), and then, if the defendant appears, to deliver a statement of claim, setting out

the bond and condition, stating each breach, and claiming damages, as though the bond were an express covenant by the defendant to do the various acts specified in the condition. The writ cannot be specially indorsed (*Tutcher v. Caralampi*, 1888, 21 Q. B. D. 414). The special procedure under 8 & 9 Will. III. c. 11, has been expressly preserved by the Rules of the Supreme Court, and must be followed (*ibid.*). If the defendant appears, he may pay money into Court, but to particular breaches only, not to the whole action (Order 22, r. 1). If the defendant fails to appear, "no statement of claim shall be delivered, and the plaintiff may at once suggest breaches by delivering a suggestion thereof to the defendant or his solicitor, and proceed as mentioned in the said statute and in 3 & 4 Will. IV. c. 42, s. 16" (Order 13, r. 14). For the form of a suggestion of breaches, see Chitty's *Forms*, 12th ed., p. 639. Judgment can then be obtained on proof of the service of the writ and of default of appearance; and a writ of inquiry will issue. A copy of the suggestion of breaches should be filed on issuing the writ of inquiry.

*Persons liable on a Bond.*—By sec. 59 of the Conveyancing and Law of Property Act, 1881, any "bond or obligation under seal" made after 31st December 1881, "though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate, of the person making the same, as if heirs were expressed." If there be several obligors, and one die, then, if the bond be joint and not several, both the real and personal representatives of the deceased obligor are discharged; *secus*, if the bond be several. And though a bond be joint in form, it will be held several, if such was the intention of the parties. If the bond be joint, all the persons liable on it should be joined as defendants (see *Kendall v. Hamilton*, 1879, 4 App. Cas. 504). But if it be several, or joint and several, the plaintiff may sue one or more at his pleasure.

*Defences to an Action on a Bond.*—1. *Illegality.*—This defence must be specially pleaded (*Harmer v. Rowe*, 1817, 6 M. & S. 146). The "facts showing illegality either by statute or common law" must be set out in the defence (Order 19, r. 15). If a bond be given to ensure or encourage the commission of a crime, or of any act *contra bonos mores*, it is void. Marriage brokerage bonds (see BROCAGE), bonds given in consideration of future (but not past) cohabitation, bonds in total restraint of trade are void. If the condition is entire and unlawful, the bond is void (*Collins v. Blantern*, 1767, 1 Sm. L. C., 9th ed., 398); but if the condition is severable and part of it is good, the bond is valid to that extent.

2. *Fraud.*—It is, of course, a defence if the obligor was induced to execute the bond by the fraud of the plaintiff.

3. *Payment or other performance* must also be specially pleaded in the defence (Order 19, r. 15). As to a general plea of performance, see Odgers on *Pleading*, 2nd ed., p. 124.

4. *Release.*—If one of several obligees release the obligor, all the other obligors are barred; unless the release was obtained fraudulently and by collusion. So a release of one obligor releases all who are jointly liable with him, unless the right to release one without discharging the others was expressly reserved to the obligee. Where the bond is several, the release of one does not affect the others, except possibly in the case of co-sureties. If the right of one co-surety to contribution be taken away by a release given to another co-surety, both are discharged (*Ward v. National Bank of New Zealand*, 1883, 8 App. Cas. 755).

5. *Accord and satisfaction (q.v.)* was formerly no defence at law to an

action on a bond, because a contract under seal could only be discharged by performance or a release or other contract under seal. But since the Judicature Act an accord and satisfaction is an answer to an action for a specialty debt (*Steeds v. Steeds*, 1889, 22 Q. B. D. 537).

*Bonds, Offences as to.*—It is a felony to forge or alter, with intent to defraud, any document, however designated, which is in law a bond, or any attestation thereto, or any legal or equitable assignment thereof, or with like intent to utter any bond, or attestation or assignment thereof, knowing it to be forged or altered. The penalty is penal servitude for life or not less than three years, or imprisonment with or without hard labour for not over two years (24 & 25 Vict. c. 98, ss. 20, 39; 54 & 55 Vict. c. 69, s. 1). The offence is not triable at Quarter Sessions (5 & 6 Vict. c. 38, s. 1).

As to the forgery, theft, mutilation, or concealment of bail bonds (*q.v.*) or recognisances (*q.v.*) belonging to a Court of Record, see RECORDS.

Forgery of recognisances purporting to have been entered into before a justice of the peace, or other officer authorised to take the same, is a felony punishable by penal servitude from three to five years, or imprisonment with or without hard labour for not over two years (24 & 25 Vict. c. 98, s. 32; 54 & 55 Vict. c. 69, s. 1).

As to personation of bail (24 & 25 Vict. c. 98, s. 32), see PERSONATION.

A bond is within the definitions of valuable security and property in the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 1, and may be the subject of LARCENY or EMBEZZLEMENT.

**Bonded Warehouse.**—On the first introduction of the warehousing system by the Statute 43 Geo. III. c. 132, in 1803, goods imported were to be placed in warehouses approved of by the Customs authorities, and bonds given by the importers for payment of the duties when the goods were removed. It was from this system of bonds that the name of bonded or bonding warehouses was given to these public warehouses.

By the Customs Consolidation Act, 1853, 16 & 17 Vict. c. 107, s. 12, it was enacted that no bond thereafter should be required to be given by the importer of any goods on the warehousing thereof, and in lieu thereof provisions were made for securing the payment of Customs duties of goods in the warehouses; all of which are now contained in the present Customs Consolidation Act, 1876, 39 & 40 Vict. c. 36, and the subsequent amending Acts, viz.: Customs and Inland Revenue Act, 1880, 43 Vict. c. 14, s. 3; the Revenue Friendly Societies and National Debt Act, 1882, 45 & 46 Vict. c. 72, s. 2; and the Revenue Act, 1883, 46 & 47 Vict. c. 55, s. 19.

Such warehouses are now known as Queen's warehouses, by the definition clause of the Customs Consolidation Act, 1876, as places provided by the Crown, or approved by the Commissioners of Customs, for the deposit of goods for security thereof, and of the duties thereon.

By sec. 12 the Commissioners of Customs may by order approve and appoint warehouses or places of security in such ports or places as shall have been appointed by the Commissioners of the Treasury as ports and inland bonding places in the United Kingdom for the purposes of the Customs Acts. They may also direct in what different parts or divisions of such warehouses, and in what manner, any goods, and what sort of goods, shall be kept; and they may also fix the amount of rent to be payable in respect of any goods deposited there.

The proprietor or occupier of every warehouse so approved (except

existing warehouses of special security, in respect of which security by bond is dispensed with), or some one on his behalf must, before any goods are warehoused, give a security by bond, or such other security as the Commissioners of the Treasury, or Customs, may approve, for the payment of the full duties chargeable on any goods, or for the due exportation thereof when they are deposited there for exportation, and on that account not liable to duty as they would be if intended for home consumption (s. 13).

The goods are received into the warehouse by a bill of entry (*q.v.*) which, when signed by the Customs collector, or other proper officer, is the warrant for warehousing; and after being marked and described, and the particular warehouse entered in the book of the proper officer, they are considered to be duly warehoused; and there must be no subsequent dealings with them except under the authority of the Customs officers. The Act prescribes various rules for the management of the goods whilst warehoused, and penalties on breach (see ss. 81–85, and 96, 116). Formerly, if goods were not cleared from the warehouse within five years, they must be re-warehoused, or were liable to be sold for the payment of duties, and any duties or deficiencies on re-warehousing were liable to be made good by the warehouse keeper (ss. 92 and 93 of Customs Consolidation Act, 1876), but these sections were repealed by the Revenue Act, 1883.

For information as to commercial effects of the warehousing system and lists of various warehousing ports, see M'Culloch's *Dictionary of Commerce*, "Warehousing."

**Book, Copyright in.**—See COPYRIGHT.

**Bookkeeping.**—See ACCOUNTS, FALSIFICATION OF; AUDITOR.

### **Books—Falsifying, Mutilating, etc.**

1. Injuries to books of whatever kind for civil purposes fall under the title TRESPASS TO GOODS, or CONVERSION.

2. All books fall within the provisions of the Larceny and Malicious Damage Acts, if they are stolen, mutilated (with intent to steal or otherwise), or destroyed.

3. As to offences with respect to books of account, see ACCOUNTS, FALSIFICATION OF.

4. As to books forming judicial or public records, see RECORDS.

5. As to offences with respect to bankrupts' books, see BANKRUPTCY.

**Booty of War.**—Moveable property captured by one Belligerent (*q.v.*) from another. The term is generally confined to arms, ammunition, and military provisions and stores, though it was at one time applicable to all kinds of property, susceptible of appropriation, captured on land. Private property on land, differing in this from private property at sea, is no longer liable to capture and confiscation. The term Prize (*q.v.*) is used of captures made at sea. Booty falling into the hands of a belligerent differs from prize, in being considered to belong to the captor without judicial decision.

• "The modern practice in England in respect of the distribution of booty of war," says Sir Travers Twiss, "is for the Crown to refer the claims of those who petition for a share of the distribution to the Lords of the

**Treasury**, who, under the advice of the law officers of the Crown, settle a scheme of distribution for the approval and sanction of the Crown itself, as all acquisitions of war belong of right to the Crown, *parla bello cedunt reipublicæ*. A statute which was passed in 1840 extends the jurisdiction of the High Court of Admiralty of England to all matters and questions concerning booty of war, or the distribution thereof, which it shall please the Crown, by the advice of the Privy Council, to refer to the judgment of that Court; and in all matters so referred the Court is to proceed as in cases of prize of war, and the judgment of the Court therein is to be binding upon all parties concerned. The High Court of Admiralty may accordingly under this statute exercise a jurisdiction in cases of booty apart from, but analogous to, its jurisdiction in questions of prize, with this difference, however, that whilst it has a customary jurisdiction over all questions of prize, it can only extend its statutory jurisdiction over such questions of booty as the Crown, with the advice of the Privy Council, may be pleased to refer to its judgment" (*Law of Nations in Time of War*, London, 1863, p. 137).

The principal British statutes relating to or affecting booty are: 3 & 4 Vict. c. 65; 11 & 12 Vict. c. 55; 29 & 30 Vict. c. 47; and 57 & 58 Vict. c. 39, of which the first three have been somewhat modified and altered by the Statute Law Revision Acts of 1874, 1888, and 1893. By 3 & 4 Vict. c. 65, 1840, jurisdiction in matters of booty is vested in the judges of the Prize Courts. See PRIZE.

**Border Warrant** was a warrant issued by a Sheriff in Scotland, on the application, supported by oath, of a creditor, to arrest the person or effects of a person resident on the English side of the Border, if found within the Sheriff's jurisdiction, and to detain him in prison until he gave *cautio judicatum sibi*. It is said to be the origin of the *meditatione fugæ* warrant, but may be compared with the Scottish procedure, arrest *ad fundandum jurisdictionem*, which is in the nature of foreign attachment. The warrant was little used. The history and practice of its abuse is traced in *Landsell v. Lansdell*, 1838, 16 S. 388, and it may be regarded as in part abolished, in part become obsolete, since the Debtors Scotland Act, 1880. It did not run into England, and there is no provision of the English law exactly corresponding to it. See BAIL; DEBTORS; NE EXEAT REGNO.

[1 Mackay, *Session Court Practice*, 171; Dove Wilson, *Scottish Sheriff Court Practice*, 4th ed., 455.]

Under the Police (Scotland) Act, 1857 (20 & 21 Vict. c. 72, s. 11), any constable appointed for any one of the Border counties of England and Scotland (namely, Northumberland, Cumberland, Berwick, Roxburgh, and Dumfries) may execute in any other of such counties any lawful warrant of a sheriff, justice of the peace, or magistrate, for the arrest of a person accused or convicted of a criminal offence, or for the recovery of goods alleged to be stolen within the county for which the constable was appointed, in the same way as it might be executed in the latter county. This appears to override the necessity of having the warrants backed under the Indictable Offences Act, 1848.

**Borough** (*burh*, a fortified place) means now an incorporated city or town. There are 315 such boroughs in England, and (with one import-

ant exception, the City of London) they are all regulated by the Municipal Corporations Act of 1882, 45 & 46 Vict. c. 50. The word "borough" is also used in connection with the election of members of Parliament, to denote a definite electoral area which may or may not coincide with the municipal borough from which it takes its name. But there is nothing in common between a parliamentary and a municipal borough, except that the mayor is generally the returning officer at a parliamentary borough election. The franchises are distinct, and separate lists of voters are always prepared, even where the areas are identical. (See FRANCHISE.)

Any town may petition the Queen for a charter of incorporation; but it must first give notice to the county council of its county, and to the Local Government Board. This petition is referred to a committee of the Privy Council, who direct a local inquiry, and evidence is given for and against the proposal. If the petition be eventually approved, a charter will be granted, incorporating the borough, and fixing the number of councillors and the number and boundaries of the wards, if the borough is to be so subdivided. As soon as the borough is incorporated, it has a perpetual succession, the power of holding lands, and the right to use a common seal. It may act, contract, sue, and be sued, in its corporate name, which is now invariably "The Mayor, Aldermen, and burgesses (or citizens) of ——" It is not to be styled an urban district council (s. 21 of the Local Government Act, 1894).

The burgesses have no direct share in the management of the town, but they elect the council, the school board, and two auditors. (See BURGESS.) The governing body is the borough council, which has all the powers of an urban district council under the Act of 1894; it consists of the mayor, aldermen, and councillors. The mayor is the chief officer of the corporation; he takes precedence of all persons in the borough. He is elected by the council on 9th November in each year. The aldermen are also elected by the council; they hold office for six years, one half of their number retiring by rotation every three years. The number of councillors is fixed according to the size of the borough, when it is incorporated; and the number of aldermen is always one-third of that of the councillors. The other officers of a borough are generally the town clerk, the treasurer, three auditors (two elective, and one appointed by the mayor), and in some cases, a sheriff, a recorder, a clerk of the peace, a clerk to the magistrates, and a coroner. (See MUNICIPAL CORPORATION.)

There are various classes of boroughs which require special mention:—

1. *Counties of Cities; Counties of Towns.*—These are ancient boroughs which have all the organisation of a county, e.g. Bristol, Nottingham, Norwich, Exeter. They have their own commissions of the peace and Courts of Quarter Sessions, and each year they appoint a sheriff. This appointment is made at the quarterly meeting of the council, on the 9th November in each year, immediately after the election of the mayor. There are eighteen of these counties of cities or towns; they are wholly independent of the surrounding counties; the county authorities have no jurisdiction within their area.

2. *County Boroughs.*—This is a special class of borough created by the Local Government Act of 1888. It was originally intended that there should be only eight county boroughs, and the bill was so drawn. But in Parliament the number was increased to sixty-one (see schedule 3 to the Act); all boroughs which had a population of not less than 50,000 were included, together with some ancient cities and boroughs having a less population. The same place may be both a county of a city or town, and a

county borough; though most county boroughs are not counties of towns; while a few counties of cities or towns, such as Lichfield and Poole, are not county boroughs. A county borough is practically exempted from the jurisdiction of the county council of its county; its own borough council has in fact most of the powers conferred by the Act of 1888 upon county councils, except as to parliamentary elections. But the constitution of the borough council is unchanged by the new powers conferred on it. It continues to act as a borough council; and it is the county council for the borough as well. A county borough makes no contribution (with a few unimportant exceptions) to the expenses incurred for county purposes. And this has involved the necessity of making an elaborate adjustment of the financial relations between the county borough and its county, in respect of local taxation, licences, and probate duties, which may be revised by order of the Local Government Board after every five years. But if no assizes be held in the county borough, the latter must contribute towards the cost of the county assize. So, if it has no separate Court of Quarter Sessions, it must contribute to the expense of the Quarter Sessions of the county, and also of the county coroners.

3. *Boroughs having a separate Court of Quarter Sessions.*—There are 131 of these. Each such borough has a recorder and a clerk of the peace; it also, as a rule, elects its own coroner; but see sec. 38 of the Local Government Act, 1888. All these boroughs, if not county boroughs, are part of the adjoining county for some purposes, *e.g.* main roads; if the population be less than 10,000, the borough is included in the county for most, if not all, administrative business. If a borough has not a separate Court of Quarter Sessions, the council may petition Her Majesty to grant one. The petition must specify the salary which the council is willing to pay the recorder. In eighteen of these boroughs there is also by prescription a Borough Court of Civil Jurisdiction, of which the recorder is also judge (*e.g.* the Mayor's Court, London; the Court of Passage at Liverpool; the Salford Court of Record; the Tolzey Court at Bristol, etc.). The jurisdiction of such Court is generally limited to causes of action arising within the borough, but unlimited as to the amount which can be claimed in the action. And see the Borough and Local Courts of Record Act, 1872, 35 & 36 Vict. c. 86.

4. *Boroughs having a separate Commission of the Peace.*—A separate commission has been granted to many boroughs, and may be granted to others, on application under sec. 156 of the Municipal Corporations Act, 1882. Such a separate commission does not of itself exempt a borough from the county rate, or deprive the county justices of their right to act within the borough at Petty Sessions, or in matters concerning the borough at Quarter Sessions. It only enables the borough justices to act in the borough as if they were county justices acting in and for a distinct petty sessional division. But, in practice, it is rare for the county justices to sit in a borough having a separate commission of the peace. Such a borough, too, is a separate licensing division. The mayor is *ex officio* a magistrate for the borough during his year of office, and for one year afterwards. Every other borough magistrate is appointed by the Crown; he must, while acting as such, reside in or within seven miles of the borough, or occupy a house, warehouse, or other property in the borough; but he need not be a burgess (*q.v.*) or have any qualification by estate such as is required for a justice of a county (s. 157). The borough justices appoint their own clerk, who must not be a borough councillor (s. 159). In some boroughs a stipendiary magistrate has been appointed.

*Borough, Property of, Offences as to.*—1. Unlawfully and maliciously



setting fire to a building (other than a church, house, or station) belonging to a municipal borough, is felony, punishable by penal servitude for life, or not less than three years, and imprisonment with or without hard labour for not over two years, and the offender may be required to find sureties for the peace, etc. A male under sixteen may also be whipped (24 & 25 Vict. c. 97, ss. 5, 73; 54 & 55 Vict. c. 69, s. 1).

2. Rioters who unlawfully and with force demolish, or begin to demolish, any such building belonging to a municipal borough, commit a felony punishable as 1. except as to whipping (24 & 25 Vict. c. 97, ss. 11, 73; 54 & 55 Vict. c. 69, s. 1). Neither offence is triable at Quarter Sessions (5 & 6 Vict. c. 38, s. 1).

3. Rioters who unlawfully and with force damage any such building are guilty of misdemeanour and liable to penal servitude from three to seven years, or imprisonment as for 1. (24 & 25 Vict. c. 97, ss. 12, 73; 54 & 55 Vict. c. 69, s. 1). On an indictment for the second offence, the jury, if they think the facts warrant it, may convict for the third (24 & 25 Vict. c. 97, s. 12, proviso).

4. Unlawful or malicious destruction or damage of books, manuscripts, or works of art kept in any building belonging to a municipal borough, is a misdemeanour, punishable on indictment by imprisonment, with or without hard labour, for not over six months, or fine, and sureties for the peace may be required. A male offender under sixteen may also be whipped (24 & 25 Vict. c. 97, ss. 39, 73).

In prosecutions for these offences the property in the building, etc., is laid in the corporation of the borough, described by its corporate name, *i.e.* the mayor, aldermen, and burgesses or citizens of the borough or city (45 & 46 Vict. c. 50, s. 8), other than the City of London.

Where works of art are lent for exhibition, the corporation has a special property in them sufficient to support criminal proceedings for theft or damage.

5. Under sec. 306 of the Public Health Act, 1875, 38 & 39 Vict. c. 55, any person who destroys, pulls down, injures, or defaces (*a*) any notice board on which a by-law, notice, or other matter is inscribed, if it was put up with the authority of the corporation of a municipal borough, or (*b*) any advertisement, placard, bill, or notice put up by or under the direction of such authority, is liable on summary conviction to a penalty not exceeding £5. The procedure under sec. 6 is under the Summary Jurisdiction Acts (38 & 39 Vict. c. 55, s. 251; 47 & 48 Vict. c. 43). Both these offences seem also to fall within the general provisions of sec. 52 of the Malicious Damage Act, 1861, 24 & 25 Vict. c. 97, modified as to punishment by sec. 5 of the Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49.

6. Under sec. 307 of the Public Health Act, 1875, 38 & 39 Vict. c. 55, any person who *wilfully* damages any works or property belonging to a local authority (including the corporation of a municipal borough as sanitary authority) in cases where no other penalty is provided by the Act of 1875, is liable on summary conviction to a penalty not exceeding £5.

*Sessions.*—The Sessions held in boroughs are (1) Petty Sessions; (2) Special Sessions; (3) Licensing or Brewster Sessions; (4) Quarter Sessions. See those headings.

**Borough English.**—A custom under which the youngest son is the sole heir of the dead tenant. Such a custom prevailed widely in mediæval England among the villein tenants. There is no reason to

suppose that it was of Celtic origin; it has been found in all parts of Germany. Nor is there any reason for connecting it with the mythical *ius primæ noctis*. The lord in his own interest forbids all partition of the villein tenements. The peasant, says a German proverb, has only one child. When partition is prohibited, it is by no means unnatural that custom should select the youngest son as the heir. Apparently in the thirteenth century this mode of inheritance was rarely found except in villein tenements, and its existence raised a presumption of unfree tenure. The name by which it is known (*Borough English*) seems due to a single case. In the Norman time a new French borough grew up beside the old English borough of Nottingham, and in 1327 (Y. B. 1, Edw. III. f. 12) the attention of lawyers was pointedly drawn to the fact that while primogeniture prevailed in the "burgh Francoys," ultimogeniture prevailed in the "burgh Engloys." As a matter of fact this custom, though by no means unknown, does not seem to have been very common in the boroughs. At Leicester it was abolished by Earl Simon de Montfort on the petition of the burgesses. Probably in 1327 the King's Courts had seldom been obliged to take note of it, as they did not enforce the customs which regulated the descent of villein tenements.

According to settled usage the term *Borough English* implies merely ultimogeniture among sons. Ultimogeniture among brothers and other collaterals is occasionally, though not so frequently, found, but must be specially pleaded, and is not connoted by the term *Borough English*. Customs which give the whole land to the youngest of several daughters have existed in the past and may exist at the present time, but these again are not covered by an allegation of the Borough English custom.

**Borough Fund.**—All moneys received by a borough in the ordinary course of its affairs (*e.g.* all rates, fees, and the rents and profits of the corporate property) are paid into a fund called the borough fund, and out of this fund is drawn all the money necessary for the ordinary expenditure of the borough. If, as is generally the case, the fund is not sufficient to meet the expenditure, the council has no power to contract any temporary loan; it must from time to time raise a rate to be levied in the borough to make up the deficiency. This is called the borough rate; see secs. 144 to 149 of the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50. The council assess the amount to be contributed by each parish. The assessment is usually based on the poor-rate valuation, but a special valuation may be made, if necessary. The overseers of each parish are responsible for the collection of the rate. If it should ever happen that the fund is more than sufficient to meet the ordinary expenditure of the borough without the aid of a rate, the surplus must be applied, under the direction of the council, "for the public benefit of the inhabitants and improvement of the borough" (s. 143). But the borough council may not make rates for the purpose of creating a surplus to be so applied, nor can it make any binding agreement to apply the surpluses which may arise in future years to any particular object (*A.-G. v. Newcastle-upon-Tyne*, 1889, 23 Q. B. D. 492; [1892], App. Cas. 568; and see *A.-G. v. Birmingham*, 1866, L. R. Eq. 552; *R. v. Sheffield*, 1871, L. R. 6 Q. B. 652).

The expenses of the police force are in certain cases provided for out of a special rate. If, on inspection, the force is certified to be efficient, the Treasury make a grant in aid amounting to half the pay of the men. The Treasury also contribute towards the cost of criminal prosecutions.

The extraordinary expenditure of the borough is not defrayed out of the borough fund. Money needed for works of utility of a more or less permanent character is raised by loan, repayable by instalments, and charged on the rates. It is right that the cost of a town improvement which will last for several years should be spread over an equivalent period, and not charged on the income of the year in which it is incurred. It is generally necessary, however, to obtain the consent of the Local Government Board before the money is borrowed. See **BORROWING POWERS.**

All payments to the treasurer of a borough are paid into the borough fund; all payments to and out of the borough fund are made to and by him. Some payments may be made out of the fund without an order of the borough council; these are specified in part i. of the fifth schedule to the Act of 1882. Other payments (specified in part ii. of that schedule) may not be made without an order of the council, which must be signed by three members of the council, and countersigned by the town clerk (s. 141). See *A.-G. v. Cardiff* [1894], 2 Ch. 337; and the Municipal Corporations (Borough) Funds Act, 1872, 35 & 36 Vict. c. 91, s. 2.

### **Borough Jurors.**—See **JURY.**

**Borrowing Powers.**—Our various local authorities have freely exercised their powers of borrowing money in the past. The present debt is enormous; and it is increasing at an alarming rate—far faster than we reduce the National Debt. In 1892 the debt of the Metropolis (excluding the London School Board) was £33,588,485; that of the various boroughs outside London, £142,553,496; that of the rural sanitary and highway authorities, £1,832,142; and that of other urban and rural local authorities (excluding School Boards) £10,391,415. To this must be added the debt of the London School Board, £7,336,411; of the Borough School Boards, £6,799,164; and of the County School Boards, £5,022,980. We thus arrive at a total debt of £207,524,093 in 1892; and it has largely increased since then.

Yet the borrowing powers of these local bodies are all under the control of some central authority—save possibly when conferred by some special Act. In some instances the controlling authority is the Treasury, in others the Home Office, in a few cases (as when piers or harbours are concerned) the Board of Trade, but in most cases, the Local Government Board. In each instance, when a loan is required by a municipal corporation, the controlling authority has to be applied to for its consent; a local inquiry, after due notice, is then held, and, if the loan is approved, a term of years is fixed over which the repayment is to extend. In order to escape from the control of any Government department, borough councils frequently apply direct to Parliament for a private Act to authorise the proposed expenditure. But a check has been placed on this method, also; a municipal corporation may not now pay the cost of promoting any bill in Parliament out of the borough fund without the consent of an absolute majority of the whole number of the borough council, and also of a public meeting of ratepayers convened for the purpose (see sec. 4 of the Borough Funds Act, 1872, 35 & 36 Vict. c. 91). The Local Loans Act, 1875 (38 & 39 Vict. c. 83), lays down general rules for the management of loans to local authorities.

1. *Municipal Corporations.*—Under the Act of 1882 (45 & 46 Vict. c.

50, ss. 105, 106) a borough council, as such, can only borrow money for the purpose of acquiring land, not exceeding five acres in extent, and erecting buildings thereon for municipal purposes, *e.g.* "a town-hall, council-house, justices' room, with or without a police station and cells, or a quarter and petty sessions' house, or an assize court-house, with or without judges' lodgings, or a polling station, or any other building necessary for any borough purpose." But in its capacity as an urban district council it has much more extensive powers. Under secs. 233–243 of the Public Health Act, 1875, it may, with the sanction of the Local Government Board, borrow any sums of money which it requires "for the purpose of defraying any costs, charges, and expenses incurred or to be incurred by them in the execution of the Sanitary Acts or of this Act, or for the purpose of discharging any loans contracted under the Sanitary Acts or this Act." It may borrow any sum needed for such purpose "on the credit of any fund or all or any rates or rate out of which they are authorised to defray expenses incurred by them in the execution of this Act; and for the purpose of securing the repayment of any sums so borrowed, with interest thereon, they may mortgage to the persons by or on behalf of whom such sums are advanced any such fund or rates or rate." Joint boards, port sanitary authorities, and joint sewerage boards, under sec. 244 of the same Act, have like powers of borrowing on the credit of any fund or rate applicable by them to purposes of the Act, or on the credit of their sewage land and plant. The Public Works Loan Commissioners may, if they see fit, on the application of any local authority, make any loan to such authority for any of the purposes of the Public Health Act, 1875, on the security of any fund or rate applicable to any of the purposes of the Act, without requiring any further or other security (s. 242).

2. *County Councils.*—A county council may from time to time, with the consent of the Local Government Board, borrow, on the security of the county fund, and of any revenues of the council, such sums as may be required for consolidating the debts of the county; or for purchasing any land, or building any building, which the council are authorised by any Act to purchase or build; or for any permanent work or other thing which the county council are authorised to execute or do, and the cost of which ought in the opinion of the Local Government Board to be spread over a term of years; or for making advances to any persons or bodies of persons, corporate or unincorporate, in aid of the emigration or colonisation of inhabitants of the county, with a guarantee for repayment of such advances from any local authority in the county, or the Government of any colony; or for any purpose for which Quarter Sessions or the county council are authorised by any Act to borrow (Local Government Act, 1888, s. 69). But even the Local Government Board cannot, without the express approval of Parliament, sanction any loan which will bring the total debt of a county above a tenth of the rateable value of the property within its area. The loan may be secured either by "county stock" issued under the provisions of the Act of 1888, by debentures or annuity certificates under the Local Loans Acts, 1875, or by mortgage under the provisions of the Public Health Act, 1875. But every loan must be repaid within thirty years by means of equal yearly or half-yearly instalments, or by means of a sinking fund (see secs. 69 and 70 of the Local Government Act, 1888, and sec. 63 of the Local Government Act, 1894). The London County Council has special borrowing powers inherited from the Metropolitan Board of Works (51 & 52 Vict. c. 41, s. 40, subs. 9; and see 53 & 54 Vict. c. 41; and 54 & 55 Vict. c. 62).

3. *District Councils*.—An urban district council has all the powers formerly possessed by an urban sanitary authority; a rural district council has all the powers of its predecessors, the rural sanitary authority, and of the Highway Board (ss. 21 and 25 of the Local Government Act, 1894).

4. *Parish Councils*.—By sec. 12 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), a parish council may borrow money for purchasing any land or building, any buildings which the council are authorised to purchase or build; or for any purpose for which the council are authorised to borrow under any of the adoptive Acts; or for any permanent work or other thing which the council are authorised to execute or do, and the cost of which ought, in the opinion of the county council and the Local Government Board, to be spread over a term of years. But such money can only be borrowed with the consent of the county council and the Local Government Board, and subject to the like conditions as a local authority may borrow for defraying expenses incurred in the execution of the Public Health Acts—subject, that is, to secs. 233, 234, 236 to 239 of the Public Health Act, 1875. The money must be borrowed on the security of the poor-rate and of the whole or part of the revenues of the parish council; and the total amount borrowed must not exceed one-half of the assessable value of the parish.

A parish council can only borrow money for the purposes of any of the adoptive Acts, in accordance with the Act of 1894; but the charge for the purpose of any of the adoptive Acts shall ultimately be on the rate applicable to the purposes of that Act. The county council may lend to a parish council any money which the parish council is authorised to borrow.

As to the power of a local authority to borrow money for the purpose of providing or maintaining an asylum, see sec. 274 of the Lunacy Act, 1890 (53 Vict. c. 5), and ASYLUMS, *ante*, vol. i. pp. 389, 390. As to the borrowing powers of a School Board, see SCHOOL BOARD. The right of a building society to borrow money depends on sec. 15 of the Building Societies Act, 1874 (37 & 38 Vict. c. 42), and sec. 14 of the Building Societies Act, 1894 (57 & 58 Vict. c. 47). See BUILDING SOCIETIES.

**Bottomry.**—"Bottomry is a contract by which, in consideration of money advanced for the necessities of the ship to enable it to proceed on its voyage, the keel or bottom of a ship *pars pro toto* is made liable for the repayment of the money in the event of the safe arrival of the ship at its destination" (Lord Stowell, *The Atlas*, 1827, 2 Hag. Adm. 53). "A contract similar to this upon the cargo of the ship is called *respondentia*, but is of rarer occurrence" (*ibid.* 57); but in practice it is common for ship, freight, and cargo to be hypothecated together under the name of bottomry. "In *Le Guidon* it is called *bomerie*, and Molloy says it is derived from *bomerie* or *bodmerie*, a Flemish word which signifies the keel or bottom of a ship" (Marshall, *Insurance*, 1865, pp. 573 ff.). The practice of hypothecating property exposed to maritime risks goes back over two thousand years. It was common among the Greeks, especially the Athenians, who in the fourth and fifth centuries B.C. carried on a great maritime trade, and it forms the subject of several speeches of Demosthenes in the Athenian Courts (see Sandys and Paley, *Private Orations of Demosthenes, the Phormio, the Dionysodorus, and the Lacritus*, the date of which is about 330 B.C.). It was known as *δάνειον* or *ἑλδοσις*, and in the last-named speech a form of bottomry bond is given on cargo on board a ship making a voyage out and home to Athens; it carried maritime interest, and the current rate seems to have

been about 22 per cent. for a voyage out and home (*ἀμφοτεροπλους*), and 12 per cent. for a single voyage (*εἰσροπλους*). Thence it was adopted into the Roman law. "In this law, which treats largely of these contracts, it is called *fœnus nauticum* or *usura maritima*, and the high interest which is permitted and which is to reimburse the lender (who in all cases, and not the borrower, is to run the risk) is therein denominated *periculi pretium*, or price of hazard which the lender incurs." . . . "The definition of bottomry bonds which I find in all the writers that have adverted to the subject, are contracts in the nature of mortgages of a ship on which the owner borrows money to enable him to fit out the ship or purchase cargo for the voyage proposed, and pledges the keel or bottom of the ship *pars pro toto* as a security for repayment. It is, moreover, stipulated that if the ship is lost in course of the voyage by any of the perils enumerated in the contract, the lender also shall lose his money; but if the ship shall arrive safe he shall be paid back his principal and also the interest agreed upon, called marine interest" (Lord Stowell, *The Atlas*, *ante*). A statute of George II. (19 Geo. II. c. 37, s. 5, 1746) imposed certain conditions for lending sums of money on bottomry and respondentia upon ships belonging to British subjects engaged in the East Indian trade, viz. that the bond shall be expressed to be given on the security of such ships and their cargoes only, and that the benefit of salvage shall be allowed to the lender, who alone was allowed to insure the adventure, no borrower being able to recover more on any policy made by him than the excess of his interest in the ship or cargo respectively. This statute is said to have caused the disuse of respondentia bonds (*The Gratitude*, White and Tudor's M. C. notes). The practice of owners giving bottomry bonds has been replaced by mortgages; the practice of the master giving bottomry bonds has declined very much of late years, since the master's duty to communicate with his owners was insisted upon in *The Bonaparte*, below, p. 223, and the facilities for communication now given by telegraph; and since the possession by the master of a maritime lien for disbursements was recognised in 1865 (*The Mary Ann*, L. R. 1 Ad. & Ec. 8, now confirmed by statute, M. S. A., 1894, s. 167; Abbott, *Shipping*, pp. 171 ff.).

*Who may grant a Bottomry Bond.*—The owner of the vessel may do so, but only in case of necessity and inability to raise the money on his personal credit. See *The Royal Arch*, 1857, Swa. Ad. 269, where Dr. Lushington, while allowing a bond to be good which had been made by the master of the ship with the consent of the owner on a British ship in a foreign port for a new voyage, said that contracts of bottomry made by the owners themselves in this country at the beginning of a voyage, by the terms of which the ship is pledged as a security, cannot be enforced in the Admiralty Court against the ship (p. 277). So in *The Helgoland*, 1859, Swa. Ad. 491, a bond given by the master and owner of a ship (who was a British subject) in a foreign port in payment of the price of the ship was upheld; and the concurrence of the master is not necessary to enable the owner to bottomry (*The Duke of Bedford*, 1829, 2 Hag. Adm. 294). But generally from the nature of the case the master is the author of the bond (*The Zodiac*, 1825, 1 Hag. Adm. 320, Lord Stowell), and "in almost all the reported cases the Court has to deal not with the authority of the owner, but of the master, to make a bottomry bond" (Sir R. Phillimore in *The Karnak*, below, p. 222). For this purpose the master may be one who has been appointed by the agent of the owner or underwriter of the ship (*The Kennerley Castle*, 1833, 3 Hag. Adm. 1), or by a British consul who looked after the ship's interests in a foreign port (*The Zodiac*, *ante*), or by consignees of cargo (*The Alexander*, 1812, 1 Dod. 278), or

one who is ostensibly the person in charge of the adventure (*The Jane*, 1814, 1 Dod. 461); but a master has no implied authority to grant a bond for a new voyage of the ship (*The Royal Arch*, ante).

*On what a Bond is Granted.*—The subject of the bond may be ship, freight, and cargo, whether jointly or singly; but cargo is always favoured at the expense of ship and freight, for it cannot be pledged unless the ship and freight are. "The ship and freight form the primary resources for the discharge of all bottomry bonds, and the cargo is only liable when these are exhausted," even though they are not mentioned in the bond (Dr. Lushington, *The Constancia*, 1845, 2 Rob. W. 404–460); and thus in that case where the first bond was one on ship, and the second on cargo, and the third on ship, it was held that the bonds on ship were to be paid exclusively out of the proceeds of the ship, while that on cargo was to be paid out of the freight, in the first place, and only out of the cargo so far as the freight fell short of the amount. Thus a bond on ship, freight, and cargo must be satisfied out of the ship and freight before resorting to the cargo, although the effect of this may be that an earlier (and consequently ranking later, see below) bond on ship and freight may go unpaid (*The Priscilla*, 1859, Lush. 1). A bond cannot be granted on cargo before it is shipped on board for the voyage (*The Jonathan Goodhue*, 1858, Swa. Ad. 355), and is only valid against the cargo so far as it was necessary for the purposes of the cargo (*The Pontida*, 1884, 9 P. D. 102, 177).

*For what a Bond is Granted.*—"The master of a ship has no power to bind a ship on his owner by the law of England, except within special limits, that is for repairs and supplies becoming necessary for the exigencies of the voyage" (Sir C. Robinson, *The Boddington*, 1832, 2 Hag. Adm. 426). "The money must be raised to defray the expense of necessary supplies or repairs of the ship, or to enable the ship to leave the port, in which the master gives the bond to carry the cargo to its destination" (Sir R. Phillimore, *The Karnak*, below). Thus he can bind the shipowner by a bond for repairs necessary to enable the ship to complete her voyage (*The Nelson*, 1823, 1 Hag. Adm. 169); or for provisions and supplies for passengers or crew (*The Duke of Bedford*, ante, p. 221); or for the wages of master or crew which do not only fall due at the end of the voyage (*The Cognac*, 1832, 2 Hag. Adm. 373), such as those of a master obliged to leave the ship abroad (*The Rajah of Cochin*, 1859, Swa. Ad. 473); for commission due to a British consul for looking after the ship's interests (*The Zodiac*, ante, p. 221); for metalling and felting the ship (*The Pontida*, ante); for liabilities of the ship for which she can be arrested by her creditors under the law of the foreign country in which those liabilities have been incurred (*The Prince George*, 1842, 4 Moo. P. C. 21; *The Karnak*, 1868, L. R. 2 Ad. & Ec. 289, where Sir Robert Phillimore's judgment analysing the previous decisions on the point was adopted by the Privy Council, L. R. 2 P. C. 505). But this will not justify a master who gives it to obtain his own release from arrest on account of the ship (*The Prince George*, ante), or who, when his ship has been arrested in a foreign port for damages for non-delivery of cargo, gives a bond for a smaller amount than that claimed, and so obtains the release of the ship; for this amounts to "turning an unliquidated into a liquidated claim with a bottomry premium" (*The Ida*, 1872, L. R. 3 Ad. & Ec. 542). Insurance of the ship for the voyage is not a necessity, justifying a bottomry bond (*The Serafina*, 1864, B. & L. 277). The necessities of the ship must be connected with the voyage on which she is proceeding when the bond is given. Thus a bond given to pay off a bond given on a previous voyage is bad, but if to pay off one on the current voyage is good (*The Toivio*, 1853, 1 Sp. Eccl. & Adm. 185). So a previous debt of the shipowner.

though giving a right to arrest the ship, has been held not to justify a bond (*The Osmanli*, 1850, 3 Rob. W. 198; but as to this query having regard to *The Karnak*, *ante*, p. 222), nor has a liability in respect of a previous voyage (*The North Star*, 1860, Lush. 45, to repay a general average contribution on the outward voyage, *The Edmund*, ditto, 67). The cargo will not be bound by a bond given for the necessities of the ship, which are not necessities of the cargo, *e.g.* felting and metalling of the ship (*The Pontida*, *ante*, p. 222).

*The Conditions Necessary for Granting the Bond.*—The owners of the ship or the master must have no adequate personal credit or security other than the bond available at the port where it is given (*The Faithful*, 1862, 31 L. J. Ad. 81; *The Empire of Peace*, 1869, 39, ditto, 12), and it is for the master to prove the *bona fides* of his action (*The Nelson*, *ante*, p. 222). The bond must be expressed to be contingent on maritime risk only, and if it appears to be intended to be a valid security, whether the ship arrives safely or not, it is bad (*The Indomitable*, 1859, Swa. Ad. 441). If the master pledges his owners personally as well as the ship, the bond is void (*Stainbank v. Shepard*, 1853, 13 Q. B. 418); though the owner can bind himself personally in a bond as well as his ship (*Willis v. Palmer*, 1859, 7 C. B. N. S. 361). The same is the case where the personal credit of the owner is primarily and really pledged independently of maritime risk, as by taking a bill of exchange for the amount of the loan; but if such bill of exchange be intended only as a collateral security, it will not affect the bond (*The Jane*, *ante*, p. 222; *The Ariadne*, 1842, 1 Rob. W. 411; *The Staffordshire*, 1872, L. R. 4 P. C. 194; *The Onward*, 1873, L. R. 4 Ad. & Ec. 38). Thus a bond cannot be granted to a person who is already indebted to the ship; though it may be legally given for the purpose of obtaining money for the payment of debts for necessities previously incurred on personal credit, to a person who has not supplied such necessities (*The Hebe*, 1846, 2 Rob. W. 146, per Sir R. Phillimore in *The Karnak*, *ante*).

It is also a necessary condition of the bond that the master should, if possible before doing so, communicate with the owner or owners of the vessel to be pledged so as to give such owner the power of supplying money or raising it in some other way. This applies to bonds on ship or cargo equally (*The Staffordshire*, *ante*), but this is especially so in the latter case, for "the rule of law is that the master is only the agent to bind the cargo owner in the hour of necessity, and his authority must be measured by this principle" (Bowen, L. J., *The Pontida*, *ante*). This power of the master over the cargo was first authoritatively stated in *The Gratitude* (1801, Wh. & T., M. C.) by Lord Stowell, and following cases have only reaffirmed it. "That it is an universal rule that the master if in a state of distress or pressure before hypothecating the cargo must communicate or even endeavour to communicate with the owner of the cargo, has not been alleged, and is a position that could not be maintained. But it may safely both on authority and principle be said that in general it is his duty to do so, or his duty in general to attempt to . . . If, according to the circumstances in which he is placed, it be reasonable that he should—if it be rational to expect that he may obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken upon authority and principle that it is the duty of the master to do so or at least to make the attempt" (*The Bonaparte*, 1853, 8 Moo. P. C. 473, quoted in *The Hamburg*, 1864, B. & L. 253 P. C.). "The character of agent for owners of cargo is imposed on the master by the necessity of the case and by that alone. . . . The master of the ship therefore has not authority to hypothecate the cargo if in the circumstances of the case it is



reasonably practicable for him to communicate with the owner before doing so; and if he hypothecates the cargo in such circumstances without so communicating, the bond, although given and taken *bonâ fide*, is not binding on the cargo" (*The Hamburg, ante*). Such communication must state the necessity for hypothecation (*The Olivier*, 1862, Lush. 488; *The Onward, ante*, p. 223, in which Sir R. Phillimore's observation on the judgment in *The Oriental* (1851, 7 Moo. P. C. 459), that "in the opinion of the Appellate Court a mere statement of injuries done to the ship and of the consequent necessity of repairs which would entail considerable expense, unaccompanied by a statement that a bottomry bond must be had recourse to, was not a sufficient communication to the owners," was approved by the Privy Council in *Kleinwort v. Cassa Maritima de Genoa*, 1877, 2 App. Cas. 158). Where no communication can be made, no attempt to make it is necessary (*The Lizzie*, 1868, L. R. 2 Ad. & Ec. 254). If the master thus acts on his own responsibility, he must show that granting the bond was an act prudently done for the benefit of the owners, whether of ship or cargo (*The Gratitude, ante*, p. 223, Lord Stowell; *The Onward, ante*); and he should endeavour in the first place to raise the money on the credit of the owners, e.g. by advertisement, though a mere omission to advertise will not invalidate the bond (*The Laurel*, 1864, B. & L.); and should consult with competent persons as to its advisability, e.g. Lloyds' agents (*The Lord Cochrane*, 1844, 3 N. C. 172). Communication may be impossible though the ship is in a part of the country where the owners are residing (*La Ysabel*, 1812, 1 Dod. 273, a Spanish port and Spanish owners); and this has been so held even where the ship was in an English port and the owner lived in England (*The Trident*, 1839, 1 Rob. W. 29), though this is not a likely case at the present day when "the electric telegraph has almost killed bottomry bonds" (the argument in *The Sara*, 1889, 14 App. Cas. 212). Though the cargo is bottomried justifiably, the shipowner is liable to indemnify the cargo owner for the bond; "for *The Gratitude* did not determine anything as to the rights of the shipowner and cargo owner *inter se*, but only as to the authority of the master in binding the cargo to the lender of the money" (*Benson v. Duncan*, 1849, 2 Ex. Rep. 554, and 3 ditto, 655, Pollock, C. B.).

*The Validity of a Bond.*—The general rule is that bottomry bonds are favourably viewed by the Court. "Bottomry bonds are of a very-high and privileged nature. They were invented for the purpose of procuring the necessary supplies for ships which may happen to be in distress in foreign ports where the master and owners are without credit, and where, unless assistance could be secured by means of such an instrument, the vessels and their cargoes must be left to perish. It is important therefore to the interests of commerce that bonds of this kind should be upheld with a very strong hand, and accordingly they have at all times been so upheld by this Court when they appear to have been entered into *bonâ fide* and without any suspicion of fraud" (Lord Stowell, *The Alexander, ante*, p. 221, and so per Dr. Lushington, *The Rajah of Cochin, ante*, p. 222). The editors of the last edition of Abbott on *Shipping*, however, observe that this rule is narrowed by the decision in *The Pontida*, and the master's authority is now much more limited than formerly (p. 170). No particular form is necessary for a bond beyond being in writing, and showing either expressly or impliedly that the loan is made on the security of the property against maritime risk (*The Elpis*, 1872, L. R. 4 Ad. & Ec. 1; *The D. H. Bills*, 1878, 4 P. D. 32). Forms of bottomry and respondentia bonds are given in Abbott, 1245. A bond may be partly good and partly bad, and in such a case will be upheld so far as it is good (*The Augusta*, 1813, 1 Dod. 257; *The*

*Osmanli*, ante, p. 223; *Cargo ex Sultan*, 1859, Swa. Ad. 504, where part of the cargo on which a respondentia bond was given was not exposed to maritime risk; *The Staffordshire*, ante, p. 223). As already seen, it must not be given to secure a loan on personal credit or security (*The Ida*, ante, p. 222), but the presumption is in favour of a bottomry security being intended; and "the fact of a lien existing on the ship by the law of the country where the bond is given is an important ingredient in favour of bottomry and against personal credit" (Dr. Lushington, *The Fibilia*, 1835, 1 Rob. W. 7). The validity of the bond, so far as the power of the master to make it is concerned, is determined by the law of the flag under which the ship sails (*The Gaetano and Maria*, 1882, 7 P. D. 137, confirming the principle laid down by Willes, J., in *Lloyd v. Guibert*, 1865, 6 B. & S. 100, and followed in *The Karnak*, ante, p. 222). The necessity of communication, if possible, between master and cargo owner before granting a bond on the cargo is a provision peculiar to English law (Sir R. Phillimore, *The Karnak*, ante), and therefore, unless the ship is British, a bond granted by the master without such previous communication is good; for "this is not a matter of procedure to be governed by the law of the forum on the ground that it is a matter of evidence, because the manner of proving the facts is matter of evidence and of procedure, but the facts to be proved are not matters of procedure: they are the matters with which the procedure has to deal. The facts which are to be proved in order to give the captain the authority are not the evidence of those facts" (Brett, L. J., *ibid.*). The validity of the bond, so far as the lender is concerned, depends not only on whether it is a *bond fide* transaction on his part, but whether there is actual necessity for this security. He is therefore bound to make inquiries as to the necessity for it (*The Orelia*, 1835, 3 Hag. Adm. 87; *The Prince of Saxe-Coburg*, 1837, ditto, 387; *The Hamburg*, ante, p. 223; *The Pontida*, ante, p. 222); for "it is the necessity of the hour, and not what the lenders thought, which is the test of the validity of a bond" (Bowen, L. J., *The Pontida*, ante). But he is not bound to see to the application of the money which he advances (*The Jane*, ante, p. 222, Lord Stowell); nor is his bond invalidated by transactions (of which he has no notice) between the owner and a mortgagee of the ship, which might render the voyage illegal (*The Mary Ann*, 1865, L. R. 1 Ad. & Ec. 13). A bond may be granted to an agent of the shipowners (*The Hero*, 1817, 2 Dod. 139; *The Staffordshire*, ante, p. 223), but is then more closely scrutinised.

*Rights under the Bond.*—The bond is enforced by proceedings *in rem* in the Admiralty Court against the property hypothecated; a County Court has no jurisdiction in bottomry (*The Elpis*, ante, p. 224). It must be enforced as soon as it falls due (*The Rebecca*, 1804, 5 Rob. C. 105), but not before that time, or the bondholder may be liable to damages and costs (*The Endora*, 1879, 4 P. D. 288). If the voyage agreed upon in the bond be abandoned or become impossible of performance, the bond becomes payable at once (*The Helgoland*, ante, p. 221; *The Armadillo*, 1841, 1 Rob. W. 255; *The Dante*, 1846, 2 Rob. W. 427; *London and Midland Bank v. Nielson*, 1895, 1 Com. Cas. 18). If the property hypothecated be totally lost, the bond by its express terms becomes void; but what would be a constructive total loss for the purpose of insurance on the property, is not a total loss in bottomry. "In case of bottomry, nothing short of the total destruction of the ship will constitute an utter loss; if it exist in specie in the hands of the owner it will prevent an utter loss" (Lord Ellenborough, *Thomson v. Ry. Ex. A. C.*, 1814, 1 M. & S. 30; 14 R. R. 388; *The Great Pacific*, 1869, L. R. 2 P. C. 516).

In such a case the bondholder is entitled to any salvage that may come

to the hands of the owner of the *res* in order to satisfy his claim against it, for "if a ship is once bottomried, the bond attaches to her very last plank, and the holder may have that sold for his benefit" (Dr. Lushington, *The Catherine*, 1851, 15 Jur. 231; followed by the Privy Council in *The Great Pacific, sup.*, where there was a clause in the bond that "it should be void if the obligors should pay in consequence of the loss of the ship such an average as by custom" should have become due on the salvage, or if the ship should be utterly lost; but this form is the same as that in *The Exeter*, 1799, *inf.*, and therefore not modern). In *Joyce v. Williamson* (1782, 3 Doug. K. B., 164), however, Lord Mansfield held that the capture of the bottomried ship was not a total loss of her in a policy on the bond, and added that "the law did not allow any average or salvage in a bottomry bond." This view is favoured by the 19 Geo. II. c. 37, 1746, above alluded to, which allowed salvage to the lenders on East India ships and goods. In a recent case, on the other hand, a bondholder on freight was allowed to sue and recover damages from a ship wrongfully colliding with the ship hypothecated, the bond there providing that in case of total loss, if there be no payment of freight, either total or partial, the sums received as loans shall not be paid back except beyond one-third of the freight, and exempting the lenders from general average (*The Empusa*, 1879, 5 P. D. 6). Probably Lord Mansfield's words mean no more than Lord Ellenborough's, above quoted, *i.e.* that a constructive total loss is not a total loss in the ordinary bottomry bond, and the result is the same in either view. The bondholder may insure the bond, but cannot include the insurance premium in its amount (*The Boddington, ante*, p. 222), though a clause in the bond that the lender shall insure, and the premium of insurance be repaid by the borrower, is good (*The Indomitable, ante*, p. 223). Marine interest up to any limit is allowed by the bond; 12 per cent. (*The Ariadne, ante*, p. 223), 20 per cent. (*The Cognac, ante*, p. 222), 36 per cent. (*The Eliza*, 1836, 1 Moo. P. C. 5), 45 per cent. (*The Great Pacific, sup.*), 50 per cent. (*The Augusta, ante*, p. 224); but the Admiralty Court, it is said, can reduce it at its discretion (though "it will only do so on clear and indisputable grounds, and it behoves the Court to act with caution in such questions" (Sir C. Robinson in *The Cognac, ante*)), and may review the reasonableness of the bond generally (*The Pontida, ante*). If the interest in the bond is omitted, the Court will allow the customary rate to be added to the amount of the bond (*The Change*, 1857, Swa. Ad. 240); and the absence of it does not affect the bond (*The Cecilia*, 1879, 4 P. D. 210). A bond usually carries interest at 4 per cent. from the time that it falls due, and a stipulation in it to pay 10 per cent. for such time has been altered by the Court to the ordinary rate (*The Sophia Cook* and *The D. H. Bills*, 1878, 4 P. D. 30, 32). The bond is negotiable by indorsement, which passed the rights under it even before the Judicature Act (*The Rebecca*, 1804, 5 Rob. C. 104; *The Catherine*, 1847, 3 Rob. W. 1).

Where more than one bond has been granted on the same *res*, the bond which is latest in date must be satisfied before the others (*The Eliza, ante*), even where the several bonds are given at the same place (*The Betsey*, 1813, 1 Dod. 289), unless they are all part of one transaction (*The Exeter*, 1799, 1 Rob. C. 174). The fact that the latest bond contains an additional security to those granted by the earlier ones does not entitle them to have the assets marshalled (*The Priscilla, ante*, p. 222, overruling *The Trident, ante*, p. 224, both decisions of Dr. Lushington). The bondholder, as has been already pointed out, takes the salvage of the *res* in case of loss. Where the freight has been hypothecated (and *semble* where it is not), all the freight to be carried on the voyage which is to be completed before the bond falls due goes to him (*The Staffordshire, ante*, p. 223), as well as freight carried on a subsequent

voyage where the fraud of the borrower has prevented the bondholder from obtaining the freight on the voyage on which the bond was given (*The Jacob*, 1802, 4 Rob. C. 245), whether such freight be chartered or payable by shippers to the charterer (*The Eliza*, *ante*). The bondholder, however, is not entitled to claim freight advanced by the charterer according to the terms of a charter party before the bond is made (*The Salacia*, 1862, Lush. 578); and the charterer may deduct from the freight due to the bondholder the insurance premium on part of the freight advanced under similar circumstances (*The Catherine*, 1857, Swa. Ad. 262).

*Place of Bottomry among Maritime Liens.*—"A bottomry bond is entitled to precedence over all claims against the ship or cargo, except wages or a subsequent bond or salvage claim" (Dr. Lushington, *The W. F. Safford*, 1860, Lush. 69); and the fact of the master making himself a party to the bond will not prevent his claim to wages or disbursements ranking before it if the bondholder is not prejudiced thereby (*The Edward Oliver*, 1867, L. R. 1 Ad. & Ec. 379; Dr. Lushington, *The Daring*, 1868, L. R. 2 Ad. & Ec. 260, and *The Eugenie*, 1873, L. R. 4 Ad. & Ec. 123, Sir R. Phillimore), but it will prevent the master claiming in prejudice of the bondholder. The rule with regard to the ranking of liens is stated to be that "liens in the nature of rewards for services rendered rank against the fund in the *inverse* order of their attachment on the *res*, and the last in time should be the earliest in payment" (MacLachlan, *Shipping*, quoted in *The Hope*, 1873, 1 Asp. 563); and this seems to hold good, except as regard wages: for the wages of master and crew and disbursements of master (M. S. A., 1894, s. 167), earned during the voyage on which the bond is given, whether due before or after the bond (*The Union*, 1860, Lush. 128, Dr. Lushington), rank before the bond; but if they are for a previous voyage they do not (*The Hope*, *ante*). Thus a lien for damage due subsequently to the bond precedes it, but *semble* not that for damage previous to it (*The Aline*, 1839, 1 Rob. W. 111); and pilotage, towage, and light and dock dues payable at the port of destination precede a bottomry bond given at the port of departure (*The St. Lawrence*, 1880, 5 P. D. 250); and where ship and freight belong to different persons, all such claims are paid rateably out of ship and freight (*The Douthorpe*, 2 Rob. W. 73). The bond ranks before a claim for necessities, even though that claim has been pronounced for before the bond is put in suit (*The W. F. Safford*, *ante*), and it has been held to merge a claim for necessities (*The Elpis*, *ante*), p. 224; and it precedes a mortgage (*The Helgoland*, *ante*, p. 221; *The Royal Arch*, *ante*, p. 221) and the claim of a cargo owner whose goods have been sold by the shipowner for the purposes of the voyage; for he has no lien at all (*The Gem of the Nith*, 1863, B. & L. 72). But a prior claim on cargo, *e.g.* for freight dues or transshipment of goods after the giving of a respondentia bond, comes before it as being in the nature of salvage (*The Cargo ex Galam*, 1863, B. & L. 167). The master cannot make the cargo owners liable for costs beyond the value of the cargo hypothecated, unless they contest the bond and fail (*The Nostra Senhora del Carmo*, 1854, 1 Sp. Eccl. & Adm. 303).

[See Williams and Bruce, *Admiralty Practice*, 1886; Abbott, *Shipping*, 1892; Carver, *Carriage by Sea*, 1891.]

**Bought and Sold Notes.**—Bought and sold notes are the records of a transaction which a broker, who has effected it on behalf of one or both parties, sends to the principals. They ought to correspond with each other and with the entry in the broker's book, and formerly they were

always supposed to be copied from the books (per Abbot, C. J., in *Grant v. Fletcher*, 1826, 5 Barn. & Cress. 436). But the book entry is now frequently made subsequently to them, or omitted altogether. No particular form of words is requisite, but there are three common varieties: (1) "*bought (or sold) for you of (or to) C. D.*"; (2) "*bought (or sold) for you*"; and (3) "*bought of (or sold to) you by me*" (Blackburn on *Sale*, 2nd ed., p. 84). Mr. Benjamin (4th ed., p. 252) adds another variety (4) which is the second employed in a case where the broker, being in fact himself the principal, purports to buy or sell as broker. In the third case the broker is personally liable on the contract, since he purports to contract as principal (*Higgins v. Senior*, 1841, 8 Mee. & W. 834; see *Pike v. Ongley*, 1887, 18 Q. B. D. 708, as to evidence of custom in such cases). In the fourth case, on the other hand, it has been questioned whether the broker, having purported to contract as agent, can sue (though he may be sued as an undisclosed principal) on the contract (*Sharman v. Brandt*, 1871, L. R. 6 Q. B. 720). See BROKER.

The bought note (*bought for you*) is sent by the broker to the buyer and the sold note (*sold for you*) to the seller.

Where a written memorandum of the contract is required to be signed by the party or his agent (Sale of Goods Act, 1893, s. 4, replacing the Statute of Frauds), the signature of a broker employed by both parties (or who, being employed by one, makes the bargain with the other, *Thompson v. Gardiner*, 1876, 1 C. P. D. 777) to the entry in his book, or to the note delivered by him to the party suing, is sufficient, provided that the entry, or the note referred to, or such note and the other note together, contain a proper memorandum of the contract (see BROKER). Where there are material variations between the notes and the entry, or some of them, considerable differences of opinion have arisen as to their effect upon the position of the parties to the action, and there are numerous and conflicting decisions. The difficulties of the subject appear to have arisen from a confusion of the question, what is admissible evidence of the contract in such case? and the question, what is a sufficient memorandum to satisfy the statute? Mr. Benjamin deduced a series of rules from the cases, but did not himself entirely avoid the error referred to. His rules are, in substance, as follows (see also Blackburn, pp. 84 *et seq.*):—

(1) The broker's entry, if in accordance with the contract, and duly signed, is a sufficient memorandum (*Grant v. Fletcher*, 1826, 5 Barn. & Cress. 436; per Parke, B., in *Thornton v. Charles*, 1842, 9 Mee. & W. 802; *Sievwright v. Archibald*, 1851, 17 Q. B. 101), and is admissible as evidence of the contract, although the notes, or one of them, do not agree with it (*s. cc.* overruling *Thornton v. Meux*, 1827, Moo. & M. 43). Mr. Benjamin says the entry *constitutes the contract*; but this cannot be the case unless the broker is authorised to contract on behalf of both parties. It may be shown that the entry is not to be in accordance with the contract at all (*Heyworth v. Knight*, 1864, 17 C. B. N. S. 298).

(2) The bought and sold notes are not, therefore, the best evidence of the contract so as to exclude a signed entry (see judgment of Erle, J., in *Sievwright v. Archibald*, *supra*). Mr. Benjamin says (citing the cases above cited) the notes *do not constitute* the contract.

(3) The bought and sold notes together, if they correspond with each other, and are in accordance with the contract, and are signed by the broker, constitute a sufficient memorandum to satisfy the statute (*s. cc.* and *Groom v. Aflalo*, 1826, 6 Barn. & Cress. 117).

(4), (5) The plaintiff's note by itself constitutes such a memorandum, unless it is shown to vary from the defendant's note or the signed entry in

the broker's book (*Hawes v. Forster*, 1834, 1 Moo. & R. 368; *Parton v. Crofts*, 1864, 16 C. B. N. S. 11; *Pike v. Ongley*, 1887, 18 Q. B. D. 708). The two notes and the entry are all memoranda of the contract, and if they differ there is no reason for taking any one of them (unless adopted by the parties, see next rules) as being correct (see judgment of Patterson, J., in *Sieveau v. Archibald*, *supra*).

(6) If the bought and sold notes correspond with each other, but differ from the original contract, and were accepted when received without question by both parties, the parties will be taken to have made a new contract in the terms of the notes (*Hawes v. Forster*; *Thornton v. Charles*; and *Sieveau v. Archibald*, *supra*). For if a bought or sold note is delivered to a party, suggesting that a contract has been made on his behalf, or with him by a broker, and he says nothing, his silence is evidence of acquiescence (*q.v.*) (*Thompson v. Gardiner*, 1876, 1 C. P. D. 777; see (9) below). Lord Blackburn says (p. 84, citing *Gregson v. Ruck*, 1843, 4 Q. B. 737) that the general opinion seems to be that the notes, exclusively of the broker's book, constitute the contract.

(7) If the contract is in writing, *e.g.* contained in correspondence, any entry or notes differing from it may be disregarded (*Heyworth v. Knight*, 1864, 17 C. B. N. S. 298), unless it has been varied by subsequent agreement (see (6)).

(8) If the notes differ from each other (or both differ from the real agreement, and they have not been adopted as a new contract), and there is no signed entry, then no memorandum exists to satisfy the statute (*Sieveau v. Archibald*, *supra*, *diss.* Erle, J., who held that the sold note delivered to the plaintiff, being in accordance with the agreement proved, was a sufficient memorandum).

(9) If a broker sell for his principal upon credit, the principal is not taken to have approved the sale until the name of the purchaser has been passed to him, and he has had a reasonable opportunity to consider whether he will approve the contract or not (a custom to this effect was found in 1810, *Hodgson v. Davies*, 2 Camp. 530; 11 R. R. 789).

The rule in Pigot's case (11 Rep. 26 b), that an alteration in a deed annuls it, has been applied to bought and sold notes, and it has been held that the plaintiff cannot recover upon the contract evidenced by a note altered by him or at his instance (*Powell v. Divett*, 1812, 15 East, 29; 13 R. R. 358; *Mollett v. Wackerbarth*, 1847, 5 C. B. 181; for the general doctrine see the notes to *Master v. Miller* in 1 Smith, *Leading Cases*).

Bought and sold notes in respect of any stock or marketable security must be stamped if the value of the property is over £5. If the value is under £100 the stamp is a penny, if it is over that sum one shilling (Stamp Act, 1891, s. 52, sched., and Customs and Inland Revenue Act, 1893, s. 3). The broker is subject to a penalty of £20 if he does not make and transmit a contract note, or does not duly stamp it. And if he transmit a note not duly stamped, he cannot recover any commission upon the sale or purchases (Stamp Act, 1891, s. 53 (3)); but if he transmit no note at all, although he is liable to a penalty, he can recover commission (*Leavoyd v. Bracken* [1894], 1 Q. B. 114).

**Bounty Money.**—1. Money payable to the officers and crew of a Queen's ship—

(a) For services in case of breach of any law as to national character, or otherwise relating to merchant shipping. See MERCHANT SHIPPING.

(b) For services in seizure for breach of the customs, laws, and regulations. See CUSTOMS.

(c) For seizure or capture under Slave Trade Acts. See SLAVE TRADE.

(d) For matters arising out of an attack or engagement with persons alleged to be pirates by land or sea. See PIRACY.

It is distinct from prize money, prize salvage, or prize bounty, which are regulated by the Naval Prize Act, 1864, 27 & 28 Vict. 24, and salvage money (see PRIZE; SALVAGE), and is given of the Royal bounty in respect of naval services not involving the salvage of vessels in distress, or the capture of an enemy's ship or property. The practice under the prerogative or statute is to distribute by way of bounty for activity in naval police, the proceeds of the property seized by the agency of a Queen's ship which is forfeited to the Crown, but is not prize in the proper sense. Its distribution is regulated by secs. 12-22 of the Naval Agency and Distribution Act, 1864, 27 & 28 Vict. c. 24, and Orders in Council made thereunder on 9th September and 9th December 1865, and 3rd August 1886, printed in Statutory Rules and Orders (Revised), vol. iv. pp. 101-116; and as to bounty for seizure of slave-ships by the Slave Trade Act, 1873, 36 & 37 Vict. c. 88, ss. 11-16.

2. A reward for enlistment in the land or sea service of the Crown. Provision was made by the Articles of War (see WAR, ARTICLES OF), 3, 130 (Code Mil. Law, 229, 262), for forfeiture of the whole or part of the bounty in the event of disqualifying infirmity or misconduct. But payment of bounties is now discontinued, the Queen's shilling on enlistment being a mere earnest to bind the bargain to serve (see Official Man. Mil. Law, 1887, 224-226, 262, and authorities there quoted).

(a) A recruit for the army after the abolition of impressment in 1660 was given a bounty to induce him to enlist.

(b) A militiaman still receives a bounty of £2 for entering the Militia Reserve.

(c) Bounties were also given for enlisting in the navy, as distinct from press money. They are now payable only on enlistment after proclamation (see 16 & 17 Vict. c. 69, s. 4). See IMPRESSMENT.

3. Queen Anne's. See QUEEN ANNE'S BOUNTY.

4. Sums paid to encourage import or export. Many have existed under English legislation; but all are now abolished. See DRAWBACKS.

5. It is usual for the sovereign to make a grant of his Royal bounty to those of his subjects whose wives produce three or more children at a birth.

**Bounty, Queen Anne's.**—See QUEEN ANNE'S BOUNTY.

**Bovill's Act.**—See PARTNERSHIP.

**Bowling.**—By a number of old statutes the game of bowls was prohibited. The most complete of these enactments was the Statute 33 Hen. VIII. c. 9, which was passed in the interests of archery, a pastime which was declining, owing, according to the preamble, to the increase of other games. This Act prohibited artificers and other servants from playing at bowls and other games except at Christmas, and then only at their masters' houses or in their masters' presence; but noblemen and others owning land of the yearly value of £100 might license their servants

to play at these games within the precincts of their houses. Further, no person whatever was permitted to play at bowls in any open place, except within his own grounds. This Act, so far as it prohibited bowls and other games of skill, was repealed by the Gaming Act, 1845.

**Boxing Match.**—1. A boxing or sparring match, if it is an honest and friendly contest with gloves, fairly conducted according to the Queensberry Rules or other like regulations, seems to be perfectly legal, and does not fall within the definition of a prize fight (*R. v. Coney*, 1882, 8 Q. B. D. 53), and homicide in the course of such a match is not manslaughter (*R. v. Young*, 1866, 10 Cox C. C. 371), unless the blow which caused death, even though in accordance with the rules, was given recklessly or with intent to cause serious injury (*R. v. Bradshaw*, 1878, 14 Cox C. C. 83). But the line between unlawful and lawful contests of this kind is fine, and a boxing match is not within the protection of these decisions where the men mean to fight on till one is subdued by exhaustion or blows (*R. v. Orton*, 1878, 14 Cox C. C. 226).

See also DUEL; PRIZE FIGHT; and Mayne, *Ind. Cr. Law*, 1896, pp. 393–396, 609.

2. The holding of boxing contests under such circumstances as to attract great crowds and cause disturbance is an actionable nuisance (*Pelican Club case*, *Bellamy v. Wells*, 1891, 7 T. L. R. 135; *Barber v. Penley* [1893], 2 Ch. 447); and persistence by any person in holding these after notice of an injunction to restrain the nuisance is a contempt of Court, even if the injunction is not specifically directed to him (*Queensberry Club case*, *Seaward v. Patterson*, 1897, 13 T. L. R. 211).

**Boycotting.**—See COMBINATIONS.

**Branch.**—See ADJOINING TENEMENTS; TREE.

**Branch Bank.**—See BANKER AND CUSTOMER (7); and as to the branches of the Bank of England, the Country Bankers Act, 1826, s. 15. As to collection by a foreign bank of a cheque drawn on an English branch, see *Lacave v. Crédit Lyonnais* [1897], 1 Q. B. 148.

**Branch Railways.**—These include what are commonly called sidings, and certain Acts of Parliament referred to below regulate their construction, maintenance, and use.

The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, s. 76, is as follows:—

And be it enacted, that this or the special Act shall not prevent the owners or occupiers of lands adjoining to the railway, or any other persons, from laying down, either upon their own lands or upon the lands of other persons, with the consent of such persons, any collateral branches of railway to communicate with the railway, for the purpose of bringing carriages to or from or upon the railway, but under and subject to the provisions and restrictions of an Act passed in the sixth year of the reign of Her present Majesty, intituled “An Act for the better Regulation of



Railways, and for the Conveyance of Troops"; and the company shall, if required, at the expense of such owners and occupiers and other persons, and subject also to the provisions of the said last-mentioned Act, make openings in the rails, and such additional lines of rail as may be necessary for effecting such communication, in places where the communication can be made with safety to the public, and without injury to the railway and without inconvenience to the traffic thereon; and the company shall not take any rate or toll or other moneys for the passing of any passengers, goods, or other things along any branch so to be made by any such owner or occupier or other person; but this enactment shall be subject to the following restrictions and conditions; (that is to say).—

No such branch railway shall run parallel to the railway:

The company shall not be bound to make any such openings in any place which they shall have set apart for any specific purpose with which such communication would interfere, nor upon any inclined plane or bridge, nor in any tunnel:

The persons making or using such branch railways shall be subject to all by-laws and regulations of the company from time to time made with respect to passing upon or crossing the railway, and otherwise; and the persons making or using such branch railways shall be bound to construct, and from time to time, as need may require, to renew, the offset plates and switches, according to the most approved plan adopted by the company, and under the direction of their engineer.

The foregoing section is not limited to the owners or occupiers at the time the railways are made, but extends to all owners and occupiers for the time being (*Monkland, etc., Railway Co. v. Dixon*, 1843, 3 Rail. C. 273; *Bishop v. North*, 1843, 11 Mee. & W. 418; 3 Rail. C. 459).

It has also been held that the assent of the company to an opening being made at a station is not in the nature of a licence, and cannot be revoked (*Bell v. Midland Railway Co.*, 1859, 3 De G. & J. 673).

Further, the by-laws and regulations referred to in the foregoing section must be reasonable, but it is for the persons using the branch railway to show that they are unreasonable (*Rhymney Railway Co. v. Taff Vale Railway Co.*, 1861, 30 L. J. Ch. 482).

The Act referred to in sec. 76 of the last-mentioned Act is the Railway Regulation Act, 1842, 5 & 6 Vict. c. 55, and sec. 12 thereof refers particularly to branch railways, and is as follows:—

"And whereas powers of laying down branch lines opening into the ledges or flanches of main lines of railway, and of entering upon and passing along such main lines with carriages and waggons drawn by locomotive engines, or by other mechanical or animal power, and also powers to form roads or railways across existing railways on a level, have been given by various Acts relative to railways to the owners or occupiers of lands adjoining the railway, and to other persons with their consent; and whereas experience has shown that the exercise of such powers without limitation would in many cases be attended with danger to the public using such railway": be it therefore enacted, that if, in the case of any railway on which passengers are conveyed by steam or other mechanical power, it shall appear to the lords of the said committee that such power as aforesaid cannot be so exercised without seriously endangering the public safety, and that an arrangement may be made with a due regard to existing rights of property, it shall be lawful for the lords of the said committee to order and direct that such powers shall only be exercised

subject to such conditions as the lords of the said committee shall direct: provided always, that no railway shall be considered a passenger railway if two-thirds or more of the gross annual revenue of such railway shall be derived from the carriage thereon of coals, ironstone, or other metals or minerals.

In addition to the foregoing Acts, the Railway Construction Facilities Act, 1864, 27 & 28 Vict. c. 121, contains provisions facilitating the making of branch and other lines of railway, and deviations of existing railways and of railways in course of construction, and also the execution of new works connected with, or for the purpose of, existing railways, when all the landowners and other parties beneficially interested consent. These powers are given so as to enable persons, on complying with the conditions thereof, to carry out such work without being obliged to procure a special Act.

**Brand.**—A distinctive brand is one of the symbols enumerated by the Patents, Designs, and Trade Marks Act, 1883, s. 64 (1 c), as the essential particulars, one or more of which must be comprised in a trade mark capable of registration under that Act. Before the Act, brands burnt into the ends of cigar boxes were not accepted as marks capable of registration, and the word was probably introduced to admit to registration such and similar marks. For some time after the passing of the Act word marks, not otherwise capable of registration, were accepted by the Comptroller as “brands,” if burnt or stamped into the goods upon which they were used (see report of the Board of Trade Committee of 1887, p. xi.). The practice referred to has now been abandoned. A water mark on paper is not necessarily a brand, and in fact there does not appear to be any definite distinction between “brand” and “mark” within the meaning of sec. 64 (c) of the above-mentioned Act (see *Pirie v. Goodall* [1892], 1 Ch. 35; *Paine v. Daniells & Sons’ Breweries* [1893], 2 Ch. 567). In the last-mentioned case the words “John Bull Brand” were claimed as a registered trade mark, and an attempt was made to support the mark as being a “brand.” It was held, however, that words do not become a brand by the addition of the word “brand” to them.

The term was sometimes applied before the Trade Mark Acts to trade marks stamped on metal goods or burnt into wine casks or corks (*Millington v. Fox*, 1838, 3 Myl. & Cr. 338; *Seixo v. Provezende*, 1865, L. R. 1 Ch. 192).

A question has arisen whether a brand upon the cork of a wine bottle so placed that it cannot be seen by a purchaser is used as a trade mark (*Kinahan & Co.’s Application*, 1893, 10 R. P. C. 393; *Richards v. Butcher* [1891], 2 Ch. 522). The question was not decided in the cases cited, but it is submitted that such use is clearly use as a trade mark, at least where it is a familiar practice (*Moet v. Pickering*, 1878, 8 Ch. D. 372).

**Branding** was a punishment recognised by Roman law in the case of thieves and fugitive slaves, and by the Canon law, and was employed under the Anglo-Saxon and Anglo-Danish laws. Since the Conquest it does not seem to have been inflicted except under statutory authority. Under a commonwealth ordinance of 1650, c. 36, branding with B was made part of the punishment for being a common bawd or keeping a common brothel.

(a) When benefit of clergy was successfully claimed the claimant was branded on the thumb with M or T, to prevent his claiming it again. The

place of branding was changed to the forehead, in the case of thieves, by 10 Will. III. c. 23, but this was repealed by 6 Anne, c. 9 (1709). See **BENEFIT OF CLERGY**.

(b) Under the Statute of Vagabonds of 1547, 1 Edw. VI. c. 2 (repealed in 1547), runaway bond servants were branded on the breast with a V, and in certain cases with an S (Slave). See **VAGRANT**.

(c) Persons convicted of drawing weapons in churches or churchyards were liable on conviction to be branded with an F. See **BRAWLING**.

(d) Persons dealing in clippings of the current coin were under an Act of 1694, 6 & 7 Will. & Mary, c. 17, s. 3, liable to be branded with an R. See **COIN BRITISH**.

The punishments (a), (c), and (d) were discontinued in the reign of George III., and abolished in 1829.

(e) Persons deserting from the army or navy were tattooed, not branded, with D or B C for identification in case of an attempt to re-enlist. The practice was abolished in 1879.

As to the branding of goods for commercial purposes by way of trade description, see **BRAND**.

Special provision is made for the branding of herring barrels in Scotland and Northumberland by the Herring Fisheries (Scotland) Acts, 1821–1890 (see Short Titles Act, 1896, sched. 2), and the Sea Fisheries (Scotland) Amendment Act, 1885, 48 & 49 Vict. c. 70, and the Branding of Herrings (Northumberland) Act, 1891, 54 & 55 Vict. c. 28.

### **Brandy.**—See **EXCISE**.

**Brawling.**—1. In its original sense as a legal term, brawling meant creating a disturbance in a consecrated building or consecrated ground. Under ecclesiastical law the Church Courts always had cognisance *pro salute animae* of such offences (*Wenmouth v. Collins*, 1704, Raym. (Ld.) 850; *Hutcheson v. Denzilar*, 1793, 1 Hag. Con. 181), and in pre-Reformation times the Courts Christian imposed penance as a punishment (see *Strange's* case, 1415, 1 Burn, *Justice*, 30th ed. 393).

At one time churches and churchyards, when not in use for religious purposes, were put to secular uses, such as markets and fairs. This mode of use was prohibited, in 1285, by the unrepealed Statute of Wynton (13th ed., 1, c. 6); and by the Canons of 1603 (88) musters, plays, feasts, banquets, suppers, church ales, drinkings, or other profane usage in churches, chapels, or churchyards, are forbidden.

2. Brawling was first dealt with by statute in 1551. By 5 & 6 Edw. v. c. 4, punishments were prescribed for quarrelling, brawling, fraying, and fighting in churches and churchyards of the Established Church, including cathedrals (*Dethick's* case, 1591, Cro. (1) 224). The penalty, if the offence was by words only, was suspension *ab ingressu ecclesie*, and in the case of clergy suspension from ecclesiastical functions (s. 1); if resort was had to blows, the offender was excommunicated, *ipso facto*, i.e. on the offence being proved in an Ecclesiastical Court.

There is old authority both in the common law Courts (*Frances v. Ley*, 1615, Cro. (2) 367) and in the Ecclesiastical Courts (*Huet v. Dash*, 1758, 2 Lee Eccl. 511), that it was unlawful to return even in self-defence blows given in a church or churchyard.

No indictment lay under secs. 1, 2 of this Act, but an indictment lay at

common law for offences within the scope of sec. 2 (*Wilson v. Greaves*, 1757, 1 Burr. 240; *Penhallo's case*, 1591, Cro. (1) 231), and under these sections the Ecclesiastical Court could proceed at the instance of any person (*Huet v. Dash*, 1758, 2 Lee Eccl. 511), without proof of a previous conviction before a common law Court (*Wilson v. Greaves, l.c.*), and could award expenses of suit, but not damages (*Large v. Alton*, 1618, Cro. (2) 462).

Under sec. 3 of the Act (repealed by 9 Geo. IV. c. 31, s. 1), malicious striking or drawing weapons with intent to strike, in a church or churchyard, was indictable, and the offender on conviction was liable to have an ear cut off, or, if he had none, to be branded on one cheek with the letter F (fray-maker and fighter), and to excommunication. Proof of conviction was necessary to give jurisdiction to the Ecclesiastical Courts under this section. In 1787 (27 Geo. III. c. 44) it was enacted that no suit for brawling or striking in church or churchyard should be instituted in an Ecclesiastical Court after eight calendar months from the commission of the offence.

In 1860 the Act of Edw. VI. was repealed, except as to persons in holy orders (23 & 24 Vict. c. 32, s. 5), and the jurisdiction of Church Courts over laymen for brawling was taken away (s. 1).

3. Interference with or disturbance of divine worship is also punishable before lay Courts, under the following unrepealed Acts:—

(a) 1 Mar. Sess. 2, c. 3 (1553), where licensed preachers are disturbed, or priests interfered with while officiating, or the least abused, or crucifixes pulled down. Power is given under this Act to constables to arrest offenders; but while removal is justified, the offender cannot after removal be detained for the purpose of bringing him before a justice (*Williams v. Glenister*, 1824, 12 Barn. & Cress. 699).

(b) Under the Act of Uniformity of 1558 (1 Eliz. c. 2, s. 3).

(c) Under the Toleration Act of 1688 (1 Will. & Mary, c. 18, s. 15).

These three provisions apply only to churches and churchyards of the Established Church, and though rarely if ever used in modern times (see *R. v. Hube*, 1794, 5 T. R. 542; 2 R. R. 669) are expressly saved from repeal by 23 & 24 Vict. c. 52, s. 6.

(d) Under the Brawling Act, 1860, 23 & 24 Vict. c. 32.

This Act applies, not only to churches, etc. of the Established Church, but also (s. 2) to chapels of any religious denomination, and to any place of religious worship duly certified under the Places of Worship Registration Act, 1855, 18 & 19 Vict. c. 81, and to any churchyard or burial ground. Whoever (1) is guilty of any riotous, violent, or indecent conduct in any such places, or (2) molests, lets, disturbs, vexes or troubles, or by any unlawful means disquiets or misuses any preacher duly authorised to preach therein, or any minister in holy orders ministering or celebrating any divine service, rite or office, is liable on summary conviction before two justices to a fine not exceeding £5, or to committal to prison for not over two months.

Any constable or churchwarden may arrest the offender immediately after the commission of the offence, and take him before a justice (s. 3). There is an appeal to Quarter Sessions by any person thinking himself aggrieved (*q.v.*) by a conviction (s. 4). See APPEALS (to Quarter Sessions).

Clerks in holy orders are subject to the Act of 1860, as well as to the ecclesiastical jurisdiction (*Vallancy v. Fletcher* [1897], 1 Q. B. 265).

Churchwardens who, under claim of the right to collect the offertories, obstructed the incumbent whilst collecting, were held not to have unlawfully molested him within the Act (*Copes v. Barber*, 1872, L. R. 7 C. P. 393), on the grounds that such collection was a lay function, and that

the incumbent was not "ministering or celebrating any sacrament, divine rite, or office."

A *bond fide* claim of right to sit in a particular place is no answer to proceedings under the Act for violence in asserting the claim (*Asher v. Calcraft*, 1888, 18 Q. B. D. 607).

[For further authorities, see Hawk., P. C., bk. 1, c. 23, ss. 24-33; Burn's *Justice*, 30th ed., *tit.* Church, ix.; Phillimore, *Eccl. Law*, 2nd ed., 738-742, 765.]

**Breach of Blockade.**—See BLOCKADE.

**Breach of Close.**—See TRESPASS TO LAND; FORCIBLE ENTRY.

**Breach of Contract; Covenant.**—See CONTRACT; COVENANT.

**Breach of Prison; Pound.**—See RESCUE; POUND BREACH.

**Breach of Promise.**—The action for breach of promise of marriage is a personal action within the rule *actio personalis moritur cum persona* (*q.v.*), so that a personal representative cannot sue in respect of a promise to marry his testator or intestate (*Chamberlain v. Williamson*, 1814, 2 M. & S. 408), unless, perhaps, where he can show special damage to the estate, as, for instance, by expenditure having been made in contemplation of the marriage and lost by reason of the breach (*l.c.*); but the circumstances causing the special damage to the property of the deceased must have been within the contemplation of the parties at the time of the promise (*Finlay v. Chirney*, 1887, 20 Q. B. D. 494). The action may be brought by either party upon breach of his or her promise by the other (*Harrison v. Cage and his Wife*, 1796, 1 Raym. (Ld.) 386); but, as actions by men are almost unheard of, for convenience it will be taken in this article that the plaintiff referred to is the woman, as was, in fact, the case in each of the authorities cited (except that last cited, in which the plaintiff recovered £400 damages). The action can only be brought in the High Court (County Courts Act, 1888, s. 56), unless the parties both agree to try it in the County Court (*ibid.* s. 64).

A promise to marry by an infant is voidable by him, and in order to enable the plaintiff to sue there must be proof of a fresh promise after the defendant's majority (*Coxhead v. Mullis*, 1878, 3 C. P. D. 439; *Northcote v. Doughty*, 1879, 4 C. P. D. 385). An offer by the plaintiff to release the defendant, followed by his refusal and by a discussion of the date for the marriage, has been held to be evidence of such a fresh promise (*Holmes v. Brierley*, 36 W. R. 795), and so has fixing the wedding day (*Ditcham v. Worrall*, 1880, 5 C. P. D. 410). But the plaintiff may sue upon a promise made to her while she was an infant (*Holt v. Ward*, 1727, 2 Stra. 937; *Warrick v. Bruce*, 1813, 2 M. & S. 205). A promise by a married man is actionable if the plaintiff did not know at the time that he was married. If she did know of the fact, the promise would be void (*Wild v. Harris*, 1849, 7 C. B. 999; *Milward v. Littlewood*, 1850, 5 Ex. Rep. 775). An express promise to marry after the defendant's wife's death is said to be illegal (*l.c.*).

The promise must be made by the defendant to the plaintiff, or, if made to a third person, communicated to her by his authority (*Cole v. Cottingham*, 1837, 8 Car. & P. 75). There must, as in the case of any other contract (see CONTRACT), be a consideration moving from the plaintiff to support the promise, and it has been said that this must be a promise by the plaintiff to marry the defendant (*Vineall v. Veness*, 1865, 4 F. & F. 344, "a man was not to be bound for ever, and the lady at liberty to have him or not at a future time," per Bramwell, B.); but this would seem to be incorrect. A refusal by the plaintiff, before breach by the defendant, to marry him, would no doubt be a discharge, but any consideration sufficient to make another contract binding would support a promise to marry. Thus in *Harvey v. Johnston* (1848, 6 C. B. 295), the consideration was that the plaintiff made a journey to Ireland in order that she might be married there. If the consideration is the woman's consent, it is not necessary that this should be given expressly, her silent acquiescence when a proposal is made (e.g. to her parents) in her presence is sufficient (*Daniel v. Bowles*, 1826, 2 Car. & P. 553).

If nothing is said as to time of performance, the promise is to marry in a reasonable time (*Potter v. Deboos*, 1815, 1 Star. N. P. 82). So the plaintiff must wait till such time has elapsed, or until any other event upon which the promise was conditional has occurred, before she sues (*Cole v. Cottingham*, *supra*). But if a conditional contract is repudiated by the defendant before the time for performance comes, as by his marrying another woman, the plaintiff may sue at once (*Frost v. Knight*, 1872, L. R. 7 Ex. 111; *Caines v. Smith*, 1846, 15 Mec. & W. 189; *Donoghue v. Marshall*, 1875, 32 L. T. 310).

The contract is not "*uberrimæ fidei*," so that the plaintiff was not bound to disclose to the defendant at the time of the agreement all material circumstances likely to affect his mind. For instance, he is not discharged by the fact that she had been confined as a lunatic shortly before and did not inform him of the fact, if she was sane at the time of the promise (*Baker v. Cartwright*, 1861, 10 C. B. N. S. 124). The only exception is that if the plaintiff had been unchaste, or had lived an immodest life before the date of the promise, the defendant is not bound (*l.c.*; *Beachey v. Brown*, 1860, El. B. & E. 796; *Young v. Murphy*, 1836, 3 Bing. N. C. 54) unless he knew of the fact at the time (*Irving v. Greenwood*, 1824, 1 Car. & P. 350). But the defendant's contract is voidable if it was induced by material misrepresentation or fraud; for instance, by untrue statements as to her social position and previous life (*Wharton v. Lewis*, 1824, 1 Car. & P. 529), made by the plaintiff or by her authority (*Foot v. Hague*, 1824, 1 Car. & P. 546). See CONTRACT.

Chastity and modest conduct (*Jones v. James*, 1868, 18 L. T. 243) after the promise is a condition subsequent, by the breach of which the defendant is released; but after much difference of judicial opinion it was decided in 1858 that the continued fitness of the defendant for marriage is not. So that where it was pleaded that by reason of bodily infirmity he could not marry without risk to his life, the plea was held to be no defence (*Hall v. Wright*, El. B. & E. 746). The fact would have been admissible in mitigation of damages, and would have given the plaintiff an option to refuse to marry the defendant if she had wished (*l.c.*).

Discharge by mutual agreement to rescind may be inferred from the conduct of the parties. Thus, where the defendant asked the plaintiff to release him and she refused, but afterwards went to live in a distant part of the country and no communication passed between the parties for two years, this was held to be evidence of a rescission (*Davis v. Bomfort*, 1860,

6 H. & N. 245). The defendant not infrequently offers to carry out his contract when proceedings are threatened. If the offer is made after breach, the plaintiff's cause of action having already accrued, she is not bound to accept it. The jury in such cases are usually directed that if they think the offer was made in good faith, it should go in mitigation of damages.

*Damages.*—There is no rule by which the assessment of damages can be regulated, but various circumstances have been ruled to be admissible in mitigation or in aggravation. The plaintiff's bad character (*Foulkes v. Selway*, 1800, 3 Esp. 236), coarse and brutal manners (*Leeds v. Cook*, 1803, 4 Esp. 256; 6 R. R. 855; Taylor on *Evidence*, s. 358), or her want of chastity, where that is not a defence (see above, *Irving v. Greenwood*, 1824, 1 Car. & P. 350), and the defendant's want of means to support her, are admissible in mitigation of damages. If the defendant alleges that the plaintiff is an immodest woman, she may call general evidence of her good character as part of her case (*Jones v. James*, 1868, 18 L. T. 243). On the other hand, if the defendant has seduced the plaintiff under cover of his promise, the jury may consider her altered social position in relation to her home and family in consequence (*Berry v. Da Costa*, 1866, L. R. 1 C. P. 331). An allegation that the defendant seduced the plaintiff, and communicated a disease to her, is a material allegation in aggravation of damages, and is not scandalous or vexatious (*Millington v. Loring*, 1880, 6 Q. B. D. 190). If the defendant makes unfounded charges injurious to the plaintiff's character at the trial, the jury are justified in taking this into account in assessing the damages (*Berry v. Da Costa*, 1866, L. R. 1 C. P. 331).

*Evidence.*—It is provided by Denman's Act (32 & 33 Vict. c. 68, s. 2) that the plaintiff shall not recover a verdict for breach of promise of marriage unless his or her testimony shall be corroborated by some material evidence in support of such promise. Such evidence may be of facts occurring before the promise alleged (*Wilcoxe v. Gotfrey*, 1872, 26 L. T. 328, 481). The fact that the defendant is present at the trial and is not called to contradict the plaintiff's statement that he made the promise, has been said to be sufficient corroboration (*l.c.*); and evidence of conversations in which the plaintiff was heard by the witness (her sister) to charge the defendant with having promised her marriage without his denying the charge, is sufficient (*Bessela v. Stern*, 1877, 2 C. P. D. 265). But the defendant's omission to reply to an abusive letter alleging a promise, is not an admission of the promise, or corroboration sufficient to support the plaintiff's case (*Wiedemann v. Walpole* [1891], 2 Q. B. 534. See ACQUIESCENCE).

The contract need not be in writing (*Cork v. Baker*, 1725, 1 Stra. 34; *Harrison v. Cage*, 1798, 1 Raym. (1d.) at p. 387). If in writing it requires no stamp (*Orford v. Cole*, 1818, 2 Star. N. P. 351).

**Breach of Trust.**—See TRUST.

**Breach of Warranty.**—See WARRANTY.

**Bread** is within the Sale of Food and Drugs Acts. See ADULTERATION; FOOD. Its manufacture and sale is also governed in the Metropolis by 3 Geo. IV. c. cvi., and elsewhere by the Bread Act, 1836, 6 & 7 Will. IV. c. 37. The substances to be used in making bread are prescribed (s. 2).

Alum is not one (*R. v. Dixon*, 1814, 3 M. & S. 11; 15 R. R. 381). All bread made except of wheat must be marked M. (s. 10). Making of bread for sale containing prohibited ingredients is summarily punishable by fine of £10 (s. 8); and millers incur a penalty of £20 for adulteration of corn, meal, or flour with any ingredient not the real and genuine produce of the corn or grain ground, and for the sale of the flour of one kind of grain as that of another.

### Breaking and Entering.—See BURGLARY.

**Breaking Bulk.**—At common law the general rule was that no dishonest or wrongful act whatever done by a bailee during the bailment could be a trespass or theft, unless in the case of certain acts which were held to destroy the identity of the subject of the bailment, and consequently the bailment itself. Thus, where a bailee of a package or bulk took things out of the package or broke the bulk, he so far altered the thing in point of law that it became no longer the same package or bulk which he received, and therefore his possession was held to become trespassory (*Viner, Tresp.* 468, 503; *R. v. Fletcher*, 1831, 4 Car. & P. 545; *Possession in the Common Law*, Pollock and Wright).

The doctrine of breaking bulk is now unimportant in view of 24 & 25 Vict. c. 96, s. 3, which enacts that whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny.

**Breaking open Door.**—Under the authority of the old maxim "an Englishman's house is his castle," it has been held to be the general rule of the common law that it is unlawful to break open the outer door of a dwelling-house, or even any wall surrounding, or any building within the curtilage, except for the purpose of executing criminal process. The only lawful entry is *per ostia (aperta) et fenestras* (*Semayne's case*, 1604, 5 Co. Rep. 91).

The rule is an absurd survival of mediæval theories, and its application is a fertile cause of dispute (see *American Concentrated Must Co. v. Hendry*, 1893, 62 L. J. Q. B. 388; *Hodder v. Williams* [1895], 2 Q. B. 663).

1. If the breaking in is with felonious intent it constitutes the crime of burglary or of house, etc. breaking. See BURGLARY.

2. If the outer door of any building is broken by a landlord or his bailiff to levy a distress for rent, it renders the distress illegal and the persons concerned in it trespassers *ab initio*, and if it be violent renders them liable to prosecution for forcible entry (see 51 & 52 Vict. c. 21, s. 7; 58 & 59 Vict. c. 24; and the Distress for Rent Rules, 1895, St. R. & O. 1895, No. 565). The same rule applies to breaking in in assertion of a right to possession unless it is done under the order of a Court. See FORCIBLE ENTRY; LANDLORD AND TENANT. The offending bailiff is also liable to have his certificate cancelled. It is, however, lawful to enter by climbing over a wall (*Long v. Clarke* [1894], 1 Q. B. 119).

3. If the breaking in is done by a sheriff's officer or bailiff of a Court it does not invalidate the execution of the civil process (*Hooper v. Lane*,



1858, 6 H. L. 443), but is an actionable trespass, and may be misconduct within sec. 29 of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), or the County Courts Act, 1888 (51 & 52 Vict. c. 43, s. 50). An order of committal or attachment for contempt of Court is not civil process within the rule (see *Harvey v. Harvey*, 1884, 26 Ch. D. 644, where the old cases are fully considered). Nor is it possible to include within the rule writs of elegit or for the delivery of land (*Semayne's case*, 1604, 8 Co. Rep. 91) or chattels; nor even a writ to arrest on civil process (see *Hooper v. Lane*, 1858, 6 H. L. 443).

4. As to breaking door, etc., to execute criminal process, see ARREST.

**Breakwater.**—See HARBOUR AND DOCKS.

**Brevet (Brevet Rank, Brevet Officer).**—A brevet commission confers upon an officer in the army, and other military forces of the Crown, a rank immediately above that which he holds in his own regiment, but does not entitle him to receive the same pay as an officer holding that higher rank under an ordinary commission. He is styled a brevet officer, and is said to hold brevet rank.

It is when his regiment is doing duty with other regiments that his brevet rank operates. He then takes rank according to his brevet commission, and has duties belonging to this superior rank which do not belong to his rank in his own regiment.

Thus, if a captain in any regiment obtains the rank of brevet-major in the army, he commands every captain on service with him when his regiment is doing brigade duty, and his rank amongst majors is regulated by the date of his brevet commission.

Brevet rank is therefore effectual for every military purpose in the army generally, but is of no avail in the regiment to which the officer holding it belongs, unless it be wholly, or in part, united for a temporary purpose with some other regiment or corps.

"The Brevet," or General Brevet, was formerly in use from the middle of the eighteenth century for the purposes of general promotion, and for the advancement of officers from the rank of captain upwards, without any additional pay, up to the rank of major-general; and at this latter stage they became entitled to a quarterly allowance. But this system was abolished after the Royal Commission on Army Promotion in 1854.

The granting of brevet rank has not been in use in respect of officers below the rank of captain, nor above that of lieutenant-colonel; and this mode of promotion has never been customary in the Royal Navy.

By sec. 3 of the Regulation of the Forces Act, 1881, 44 & 45 Vict. c. 57, and sec. 71 of the Army Act, 1881, 44 & 45 Vict. c. 58, it is enacted that, for the purpose of removing doubts as to the powers of command vested or to be vested in officers and others belonging to Her Majesty's forces, Her Majesty may from time to time make regulations as to the persons to be invested as officers, or otherwise, with command over the forces, or any part thereof, or any person belonging thereto, and as to the mode in which such command is to be exercised, provided that command shall not be given to any person over a person superior in rank to himself. This is not, however, to be in derogation of any power otherwise vested in **• Her Majesty.**

The precedence in rank and command, which officers of the regular forces

have over those of the auxiliary forces (Militia, Yeomanry, and Volunteers) holding the same rank, is provided for by the Queen's Regulations, 1895, s. 2, para. 1 (e), and it is also thereby provided that other questions of precedence among other officers of the same rank, in different branches of the service, when on duty, shall be subject to such regulations as the Secretary of State may from time to time make. Para. 9 also provides that officers appointed to act temporarily in a higher rank shall take rank as juniors to all permanent officers of the same grade; and by para. 12 officers relinquishing their commissions are not to be considered as retaining any rank in the service, either on account of such commission or of any brevet commission they may have held, except they are exempted from this regulation by the sovereign's special authority. By sec. 8, para. 9, captains having the brevet rank of field-officers, *i.e.* those whose rank enables them to have command of a whole regiment, as colonel, lieutenant-colonel, and major, are to do duty as field-officers in camp and garrison, but they are also to perform all regimental duties according to their regimental rank. And by sec. 12, para. 8, brevet field-officers doing duty with their regiments as captains are to wear the uniform of their army rank.

Officers holding brevet rank, if on the active list, are subject to military law as officers (Army Act, 1881, s. 175).

[See Clode, *Military Forces of the Crown*; and Queen's Regulations, 1895].

**Brewer.**—Brewer means a brewer of beer (43 & 44 Vict. c. 20, s. 2). The expression "beer" includes ale, porter, spruce beer and black beer, and any other description of beer (*ibid.*). The expression, by a later Act, extends to any liquor which is made or sold as a description of beer or as a substitute for beer, and which on analysis of a sample thereof at any time shall be found to contain more than 2 per cent. of proof spirit (48 & 49 Vict. c. 51, s. 4); it also extends to Berlin white beer (52 Vict. c. 7, s. 3). It was held in *Howarth v. Minns*, 1887, 51 J. P. 7, that a liquor made from sugar, herbs, and water, and found to contain more than 2 per cent. of proof spirit, was beer, and the defendant was liable in penalties for having sold the same. See also BEER.

Brewers are divided into two classes: (1) brewers for sale (43 & 44 Vict. c. 20, s. 19); and (2) brewers not for sale (see *post*, p. 244). Brewers not for sale consist of two classes: (a) persons occupying houses exceeding £15 annual value, and farmers occupying houses exceeding £10 annual value who brew for their labourers, subject to beer duty; and (b) persons occupying houses exceeding £15 annual value (except farmers occupying houses exceeding £10 annual value who brew for their labourers), not subject to beer duty (*ibid.* ss. 32, 33; 44 Vict. c. 12, ss. 14, 15). "House" is defined as including the dwelling-house, together with the offices, courts, yards, and gardens occupied therewith (44 Vict. c. 12, s. 15).

A *brewer for sale* is a person who brews for the use of any other person at any place other than the premises of the person for whose use the beer shall be brewed, and any person licensed to deal in or retail beer, who brews, shall be deemed a brewer for sale (43 & 44 Vict. c. 20, s. 19). A licence is necessary. The duty on a licence is £10, and it is only granted on the payment of the full duty (*ibid.* s. 10). The licence expires on the 30th of September in each year (*ibid.*). The penalty on any person brewing without a licence is £100, and the forfeiture of beer, materials, and utensils (*ibid.*). Every brewer for sale must, before he begins to brew, deliver to the officer surveying the premises, an entry in the prescribed form, signed by

himself, of all premises, rooms, places, and vessels intended to be used in his business, specifying the purpose for which each is to be used, and the mark by which it is distinguished (*ibid.* s. 22). Penalty, £200 (4 & 5 Will. iv. c. 51, s. 6), and the forfeiture of goods and utensils (4 Vict. c. 20, s. 5). He must cause to be legibly painted with oil colour, and keep so painted, on some conspicuous part of every mash tun, underback, wort-receiver, copper, heating-tank, cooler, and collecting and fermenting vessel intended to be used by him in his business, and of the outside of the door of every room and place wherein any part of his business is to be carried on, the name of the vessel, room, or place, according to the purpose for which it is intended (43 & 44 Vict. c. 20, s. 21). When more than one vessel, room, or place is used for the same purpose, all such vessels, rooms, or places must be marked by progressive numbers. All vessels must be so placed and fixed as to admit of the contents being ascertained by gauge or measure, and no vessel is to be altered in shape, position, or capacity, without two days' previous notice in writing to the officer of the Inland Revenue (*ibid.*). Penalty for breach of these provisions, £100 (*ibid.*). It is the duty of the officer to deliver to every brewer for sale a book, in which the latter must enter, at least twenty-four hours before beginning to brew: (a) the day and hour of brewing, with the date of making the entry; and at least two hours before commencing to mash (b) the quantity of malt, corn, and sugar to be used; and (c) the hour when all the worts will be drawn off the grains in the mash tun (*ibid.* s. 20). Penalty, £100 (*ibid.*). The brewer must also enter the quantity and gravity of the worts produced for each brewing, the number and description of the vessel or vessels in which they are collected, and the time of making the entry. Such entry must be made within one hour of the worts being collected, or, if the worts be not collected before 9 p.m., it must be made before nine next morning (*ibid.*). Penalty, £100 (*ibid.*). The true original gravity before fermentation must be entered (48 & 49 Vict. c. 51, s. 6). Before mixing the produce of separate brewings, any brewer for sale must give notice by writing in the brewing book, specifying the date of each brewing, and the number and name of each vessel containing the worts; and after mixing he must enter the dip and gravity of the worts so mixed, and the number and name of each vessel containing them (43 & 44 Vict. c. 20, s. 25). Penalty, £100 (*ibid.*). He must not cancel, obliterate, or alter any entry or make any entry which is untrue; he must keep the book on the entered premises at all times ready for the inspection of any officer, and permit him to inspect it and make extracts therefrom; and he shall, if required by the Commissioners of Inland Revenue, send notice in writing containing the prescribed particulars to the proper officer forty-eight hours before his next brewing is intended to take place (*ibid.*). Penalty, £100 (*ibid.*). An officer of the Inland Revenue may take such samples as he may deem necessary of any worts or beer or materials for brewing in the possession of any brewer for sale; and the brewer may, if he wishes, before any such sample is taken, stir up and mix together all such worts, beer, or materials from which the sample is taken (*ibid.* s. 26). If any brewer for sale shall conceal any worts or beer so as to prevent any officer from taking an account thereof, or shall mix any sugar with any worts or beer so as to increase the quantity or gravity thereof after an account of such worts or beer has been taken by an officer, and the duty has been charged thereon, he shall, for every such offence, incur a fine of £100, and the worts or beer in respect of which the offence is committed, together with the vessels containing the same, shall be forfeited (*ibid.* s. 27).

Officers should make occasional visits before the time of mashing, to see that the proper entry has been made in the brewing book, and to check the quantity of materials used. All grains in a mash tun must be kept untouched for the space of an hour after the time entered in the book as the time for the worts to be drawn off, unless the officer has attended and taken an account of such grains. All worts shall be removed successively, and in the customary order of brewing, to the underback, coppers, coolers, and collecting and fermenting vessels, and shall not be removed from the last-mentioned vessels until an account has been taken by the officer, or until after the expiration of twelve hours from the time at which the worts are collected in such vessels. When worts shall have commenced running into a collecting or fermenting vessel, the whole of the produce of the brewing shall be collected within twelve hours (*ibid.* s. 23). Penalty on a brewer for contravention, £50 (*ibid.*). Weak worts of a gravity not exceeding 25° may be collected in the coppers, heating-tanks, or other vessels entered for the purpose, and reserved for mixing with the next brewing (*ibid.* s. 25). If the original gravity of any worts contained in the collecting or fermenting vessels shall at any time be found to exceed by 5° the gravity as entered in the book by the brewer, or as ascertained by the officer, such worts shall be deemed to be the produce of a fresh brewing, and be charged with duty accordingly (*ibid.* s. 24).

The excise duty on beer is imposed by 43 & 44 Vict. c. 20, s. 11, and amending Acts. There shall be charged, collected, levied and paid for the use of Her Majesty, her heirs and successors, in respect of beer brewed in the United Kingdom, a duty calculated according to the specific gravity of the worts thereof; that is to say, upon every 36 gallons of worts of a specific gravity of 1055° the duty of 6s. 9d., and so in proportion for any difference in quantity or gravity (43 & 44 Vict. c. 20, s. 11; 52 Vict. c. 7, s. 1; 57 & 58 Vict. c. 30, s. 29). The duty becomes due immediately on being charged, and payment cannot be deferred beyond the fifteenth day of the month following that in which it is charged (43 & 44 Vict. c. 20, s. 16). If any duty payable by a brewer remains unpaid after the time within which it is payable, the collector may, by warrant signed by him, empower any person to distrain all beer, malt, or other materials for brewing, vessels, and utensils belonging to the brewer, or in any premises in the use or possession of the brewer, or of any person on his behalf, or in trust for him, and to sell the same by public auction, giving six days' previous notice of the sale (*ibid.* s. 17 (1)). The proceeds of sale shall be applied in or towards payment of the costs and expenses of the distress and sale, and in or towards payment of the duties due from the brewer, and the surplus, if any, shall be paid to the brewer (*ibid.* s. 17 (2)). In the event of any beer, malt, or other materials being so distrained, the brewer may, at any time before the day appointed for the sale, remove the whole or any part thereof on paying to the collector, in or towards payment of the duty, the true value of the beer, malt, or other materials (*ibid.* s. 17 (3)). When any materials upon which a charge of duty has been made, or any worts or beer, shall be destroyed by accidental fire or other unavoidable cause, while the same are on the entered premises of a brewer, the commissioners shall, on proof of such loss to their satisfaction, remit or repay the duty charged or paid (*ibid.* s. 18).

Every brewer for sale must provide and maintain sufficient and just scales and weights and other necessary and reasonable appliances to enable the officers to take account of, or check by weight, gauge or measure all materials and liquids used or produced in brewing (*ibid.* s. 28 (1)); he must

also render all necessary assistance to the officers in the taking of such accounts, and must also, if required by the officer, provide sufficient lights, ladders, and other conveniences (*ibid.* s. 28 (2), (3)). Penalty, £100 (*ibid.* s. 28 (4)). Any officer of the Inland Revenue may at any time, either by day or night, enter any part of the entered premises of a brewer for sale, to take an account of the materials used or to be used in brewing, and of the worts and beer produced (*ibid.* s. 29 (1)). If an officer, after having demanded admission into the entered premises of a brewer for sale, and declared his name and business at any entrance or window thereof, is not immediately admitted, the officer, and any person acting in his aid, may at any time either by day or night (but at night only in the presence of an officer of the peace) break open any door or window of the premises, or break through any wall thereof for the purpose of obtaining admission, and the brewer shall incur a fine of £100 (*ibid.* s. 29 (2)). An officer may break open and forcibly enter any part of the premises of a brewer for sale, and break up the ground in or adjoining such premises, or any wall thereof, to search for any private or concealed pipe, conveyance, or vessel; and he may also enter any house into which such pipe, etc., may lead, and break up any part of such premises to search for the vessel with which such pipe communicates (*ibid.* s. 30). Penalty, £100 and forfeiture of every pipe, and all beer, etc., found (*ibid.*). If any damage is done in the search, and such search is unsuccessful, the damage shall be made good (*ibid.*). If any person by himself, or by any person in his employ, obstructs, hinders, or molests an officer in the execution of his duty, or any person acting in the aid of such officer, he shall incur a fine of £100 (*ibid.* s. 31).

*As to Brewers other than Brewers for Sale.*—A paper in the prescribed form shall be duly delivered by an officer of the Inland Revenue to every brewer other than a brewer for sale, if chargeable to the duty on beer, and the following provisions apply:—(1) The brewer shall, before commencing to brew, enter in the paper the quantity of malt, corn, and sugar which he intends to use in the brewing; and (2) the brewer shall on demand by an officer, produce the paper for his inspection, and shall not cancel, obliterate, or alter any entry in the paper, or make any entry which is untrue in any particular (*ibid.* s. 32). Penalty, £10 (*ibid.*). The commissioners may, when they think fit, require a brewer other than a brewer for sale to verify the entries in the paper delivered to him by a declaration to be made by him before a justice of the peace or an authorised officer (*ibid.* s. 33 (1)). The charge of duty shall be made, and the duty shall be paid at such times as the commissioners shall appoint (*ibid.* s. 33 (2)). If the annual value of the house occupied by the brewer does not exceed £10, the beer brewed by him shall not be charged with duty (*ibid.* s. 33 (3)). When a brewer of beer not for sale brews beer in a house other than where he resides, he cannot claim exemption on the ground that the house where he brews is under £10 annual value, if he resides in a house above that value (*Tippett v. Hart*, 1883, 10 Q. B. D. 483). A brewer of beer not for sale shall only brew beer for his own domestic use, or for consumption by farm labourers employed by him in the actual course of their labour or employment; he shall only brew on premises occupied by him, or, in case the brewer occupies a house of an annual value not exceeding £10, on premises gratuitously lent to him by a brewer other than a brewer for sale (43 & 44 Vict. c. 20, s. 34). Penalty, £10 (*ibid.*). Any officer of the Inland Revenue may at all reasonable times enter and inspect any premises used for the purposes of brewing by a brewer other than a brewer for sale, and examine the vessels and utensils used by him for the purposes of brewing (*ibid.* s. 35).

When premises exceed £8 but do not exceed £10 annual value, the licence duty is 4s. (43 & 44 Vict. c. 20, s. 10; 48 & 49 Vict. c. 51, s. 5; 49 Vict. c. 18, s. 3); when premises exceed £10 but do not exceed £15 annual value, the licence duty is 9s. (44 Vict. c. 12, s. 14). When premises do not exceed £8 annual value, no licence is required, unless beer is brewed for consumption by farm labourers (49 Vict. c. 18, s. 3). The licence is only granted on payment of the full duty, and expires on the 30th of September in each year (43 & 44 Vict. c. 20, s. 10). Penalty on brewing without a licence where a licence is required, £100 and forfeiture of worts, materials, and utensils (*ibid.*). The excise duty on beer brewed by a brewer not for sale upon every 36 gallons of worts of a specific gravity of 1055° is 6s. 9d. (*ibid.* s. 11; 52 Vict. c. 7, s. 3; 57 & 58 Vict. c. 30, s. 29). Brewers occupying premises not exceeding £10 annual value, and brewers occupying premises exceeding £10 but not exceeding £15 annual value who brew solely for their own domestic use, are not liable to beer duty (43 & 44 Vict. c. 20, s. 33; 44 Vict. c. 12, s. 14); see also *supra*.

The penalty on an attempt to bribe an officer of excise is £500 (53 & 54 Vict. c. 21, s. 10).

As to drawbacks on beer exported, see DRAWBACKS. See further LICENSING.

**Brewster Sessions.**—See ADJOURNED SESSIONS; LICENSING.

**Bribery.**—*At Common Law.*—Bribery is the offence of giving or offering to any person holding judicial or other public office any gift or reward in order to influence the conduct of such officer in relation to his office. The acceptance by any judicial or other public officer of any such gift or reward also constitutes the offence of bribery (see the various definitions of bribery in 3 Inst. 145; and Hawk., P. C., 414).

Wherever a person is bound by law to act without any view to his private emolument, and another by a corrupt contract engages such person, on condition of the payment or promise of money or other lucrative consideration, to act in a manner which he shall prescribe, both parties are by such contract guilty of bribery (2 Doug. K. B. 400).

There is no doubt that the corruption of judicial and other public officers has always been a crime at common law (see 3 Inst. 145–148; 1 Hawk., P. C., 414, 415; 4 Black. Com. 140; 5th Rep. C. L. C. p. 20; Stephen, *Hist. of Crim. Law*, vol. iii. p. 251; Stephen, *Dig. of Crim. Law*, 5th ed., p. 97; Russ. on *Crimes*, 6th ed., vol. i. p. 443).

*Judicial Bribery.*—With regard to judicial corruption, Coke (3 Inst. 146) cites the case of Sir William Thorpe, who in 1351 was fined and removed from office for accepting bribes. Sir J. F. Stephen, in his *History of the Criminal Law*, vol. iii. p. 250, reviewing the history of the law of bribery in England, refers also to the case of Michael de la Pole, Lord High Treasurer, who was impeached for bribery in the reign of Richard II. (3 Rot. Parl. 168); the celebrated case of Lord Bacon (see also Spedding's *Life of Bacon*, vol. vii.), the case of the Earl of Middlesex, and the case of Lord Macclesfield (16 St. Tri. 767).

It is remarkable that there is no legislation on the statute book relating to judicial bribery (with the exception of a statute of 1384, 8 Rich. II. c. 3, which was repealed by the Statute Law Revision Act, 1881, 44 & 45 Vict. c. 59; Coke also mentions an Act of 11 Hen. IV., which was never printed,

see 3 Inst. 146), this affording, as has been pointed out (Stephen, *General View of the Criminal Law of England*, p. 95), a clear indication of the extreme rarity of the offence in the history of the administration of justice in England.

Sir J. F. Stephen, whilst admitting that the crime is of such rarity that the definition is imperfect, and more or less conjectural, sums up the law as to judicial corruption by stating (*Dig. of Crim. Law*, 5th ed., p. 97) that everyone who gives or offers to any person holding any judicial office, and every person holding such office who accepts, any bribe, commits a misdemeanour. As to what amounts to a bribe, he lays down that "every gift or payment made in respect or in relation to any business having been, being, or about to be, transacted before any such person in his office, is a bribe, whether it is given in order to influence the judicial officer in something to be done, or to reward him for something already done, and whether the thing done, or to be done, is itself proper or improper."

*Bribery of Public Officers.*—With regard to the corruption of public officers other than persons holding judicial office, it is a misdemeanour by any means to induce any public officer to do or omit to do any act which the offender knows to be a violation of such officer's official duty (see 3 Inst. 144; 1 Hawk., P. C., 414; 5th Rep. C. L. C., art. 35, p. 47; Stephen, *Dig. of Crim. Law*, 5th ed., p. 97; see also *R. v. Vaughan*, 1769, 4 Burr. 2494; *R. v. Lancaster*, 1890, 16 Cox C. C. 737). The mere offer of a bribe, though it be not accepted, is in itself a misdemeanour, it being an attempt to commit a misdemeanour (see per Lord Mansfield, C. J., *R. v. Vaughan*, 1769, 4 Burr. 2501; see also *R. v. Young*, cited in 2 East at p. 16).

*Bribery of Jury.*—As to the bribery of a jurymen, or the attempt to influence a jury by means of bribery, see *Young's case* (cited in *R. v. Higgins*, 1801, 2 East, 14 and 16). See also on this subject, EMBRACERY.

*Sale of Offices.*—The buying and selling of offices, that is, the taking or giving a reward for offices of a public nature, being obviously prejudicial to the interests of the public, is considered as bribery, and is indictable at common law, and also under various statutes. (See 1 Hawk., P. C., 415 and 748; 3 Bac. Abr. tit. Offices and Officers (F.); *Stockwell v. North*, 1606, Noy, 102; *R. v. Vaughan*, 1769, 4 Burr. 2494; *R. v. Pollman*, 1809, 2 Camp. 229; 11 R. R. 698; see also Russ. on *Crimes*, 6th ed., vol. i. ch. 16, and the statutes therein referred to; 3 Chitty, *Crim. Law*, 682; Stephen, *Dig. of Crim. Law*, 5th ed., pp. 103–105). See also OFFICE.

*Statutory Bribery.*—Various statutes have extended the application of the law of bribery. Thus the East India Company Act, 1793, 33 Geo. III. c. 52, s. 62, makes it a misdemeanour for any British subject holding office in the East Indies to demand or receive any sum of money or other valuable thing as a gift or present (see also ss. 63 and 64). The wording of this statute is remarkably wide (see Stephen, *Hist. of Crim. Law*, vol. iii. p. 252).

As to the bribery of Custom House officers, see the Customs Laws Consolidation Act, 1876, 39 & 40 Vict. c. 36, s. 217.

As to the bribery of commissioners, collectors, officers, or other persons employed in relation to the Inland Revenue, see the Inland Revenue Regulation Act, 1890, 53 & 54 Vict. c. 21, s. 10.

The Public Bodies Corrupt Practices Act, 1889, 52 & 53 Vict. c. 69, after reciting in the preamble that it is expedient more effectually to provide for the prevention and punishment of bribery and corruption of and by members, officers, or servants of corporations, councils, boards, commissions, and other public bodies, makes the bribery of such persons,

with a view to their doing or forbearing to do anything in respect of any matter or transaction, actual or proposed, in which the public body is concerned, a misdemeanour, both in the person who offers or gives the bribe, and in the person who solicits or receives it (see s. 1). Any person convicted of any offence under the Act is liable to imprisonment with or without hard labour for a period not exceeding two years, or to a fine not exceeding £500, or to both imprisonment and fine, and is also liable, at the discretion of the Court, to certain other penalties and incapacities (see s. 2). A prosecution for an offence under the Act can only be instituted by or with the consent of the Attorney-General or Solicitor-General (s. 4).

The Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, also creates certain offences in the nature of bribery (see ss. 112 and 398).

*Bribery at Elections.*—By far the most important aspect of the law of bribery in modern times is its relation to elections. There is authority for the proposition that bribery at elections for members of Parliament was always an offence at common law, punishable on indictment or information (see per Lord Mansfield, C. J., *R. v. Pitt*, 1762, 3 Burr. 1338; 1 Hawk. P. C., 415). But the law relating to bribery at elections was placed upon a statutory basis by the Corrupt Practices Prevention Act, 1854, 17 & 18 Vict. c. 102, which repealed earlier Acts (of 1729, 1809, and 1842) on the same subject. The definition in this Act of bribery at parliamentary elections has by later Acts been adopted and made applicable to other elections. For further information as to bribery at elections, see CORRUPT PRACTICES.

**Bridges (Destroying or injuring).**—1. It is a felony unlawfully and maliciously to pull or throw down, or in any way to destroy or do any injury to, any bridge (whether over a stream or not), or any viaduct or aqueduct over or under any of which a highway, railway, or canal passes, with intent to make such bridge, viaduct, aqueduct, highway, railway, or canal dangerous or impassable.

The punishment, on conviction, is penal servitude for life or not less than three years, or imprisonment with or without hard labour for not over two years. Male offenders under sixteen may also be whipped (24 & 25 Vict. c. 97, ss. 33, 58, 73; 54 & 55 Vict. c. 69, s. 1). See WHIPPING.

The offence is not triable at Quarter Sessions (5 & 6 Vict. c. 38, s. 1).

If acts of this kind cause death, the offender is indictable for murder or manslaughter according to the amount of premeditation; and if done with murderous intent, even where they fail, they are indictable under 24 & 25 Vict. c. 100, s. 15.

2. As to nuisances on public bridges, and indictments for their non-repair, see HIGHWAYS; NUISANCE.

3. The special provisions of 7 Geo. IV. c. 64, s. 15, as to the mode of laying the property in an indictment relating to a county, etc. bridge, or materials, etc., provided for its alteration or repair, though not repealed, have been rendered unnecessary by the creation and incorporation of county and district councils, and the vesting in them of such bridges, etc., under the Local Government Acts of 1888 and 1894. For general law, see HIGHWAYS.

**Bridle-path.**—A bridle-path or horseway is a way along which a man has a right to ride or lead a horse, although he owns no estate or



interest in the soil. Such right may be either public or private. And as a rider must occasionally dismount, a horseway includes a footway (Selwyn, *N. P.* 1263). If the horse has no rider, it may carry a burden or pack. In former days the inland transport of goods was chiefly effected by strings of pack-horses, that went to and fro in single file along bridle-paths which generally ran over rougher and steeper ground, but were more direct, than the highways in the valley. In some places these paths were paved with cobble-stones, and they were often so narrow that two horses could not go abreast, and passing-places had to be provided at intervals for the files to pass each other when they met. The public had no right to drive loose cattle along such a "packway"; hence a right to ride or lead a horse over a way does not necessarily involve the right to drive cattle along it (*Ballard v. Dyson*, 1808, 1 Taun. 279; 9 R. R. 770). A way along which a man has the right to drive cattle is called in English law a "driftway." The same way may, of course, be both a bridle-path and a driftway; but the two rights are distinct, and neither necessarily imports the other. The right will depend on the kind of user proved in each case.

Lord Coke caused some confusion on this point by an unfortunate attempt to introduce into our law his vague reminiscence of the *Institutes* of Justinian. Bracton (iv. 232) had mentioned "*iter et actum*" as rights distinct from "*viam ad carrectam et carrum*"; and Lord Coke expanded this sentence into the following much-quoted passage (Coke upon Littleton, 56 a):—

"There be three kinds of ways: first, a footway, which is called *iter quod est jus eundi vel ambulandi hominis*; and this was the first way. The second is a footway and horseway, which is called *actus ab agendo*; and this vulgarly is called pack and primeway, because it is both a footway, which was the first or primeway, and a pack or driftway also. The third is *via*, or *aditus*, which contains the other two, and also a cartway, etc.; for this is *jus eundi, vehendi, et vehiculum et jumentum ducendi*."

This is both bad English law and bad Roman law; it is not even good Scotch law; and the derivation of "pack and primeway" is obviously absurd. In Roman law "*iter*," unless the contrary was specified, included the right of riding or being carried in a litter along the way (*Dig.* viii. 3, 7, and 12), and the "*jus agendi vel jumentum vel vehiculum*" was "*actus*," and not "*via*" (*Inst.* ii. 3). "*Actus*," no doubt, in Roman law, included the right of driving cattle (*Dig.* viii. 3, 7); but in English law a horseway does not include a driftway; yet Lord Coke uses the terms as interchangeable. The distinction between these two ways is clearly pointed out in the judgments of the Court of Common Pleas in *Ballard v. Dyson*, 1808, 1 Taun. 279; 9 R. R. 770, which have been cited with approval by Pearson, J., in *Serff v. Acton Local Board*, 1886, 31 Ch. D. at p. 683. See also Selwyn's *Nisi Prius*, at p. 1263. Antecedent user is, *prima facie* at all events, evidence only of a right commensurate with such user. Evidence that a way has been used for certain purposes does not necessarily prove the existence of a right of way for other purposes or for all purposes. But the extent of the right is a question for the jury in each particular case (*Cowling v. Higginson*, 1838, 4 Mee. & W. 245; *Henning v. Burnet*, 1852, 8 Ex. Rep. 187).

**Brief.**—A brief is the document which contains the instructions for a barrister to conduct a civil or criminal case; it is his authority to appear and argue for the party named. It is always indorsed with the title of the Court and of the action, and with the names of the counsel and of the solicitor

who delivers it. It should be marked with the proper fee before counsel goes into Court. It contains a short statement of the client's case, with all material facts arranged in strict chronological order, and the observations of the solicitor thereon; this is followed by the "proofs," i.e. a detailed account of what each witness is prepared to state, if called. These proofs should be most carefully prepared by the solicitor from the witnesses' own lips; he should not trust to his client's account of what he expects the witnesses will swear to; such expectations are often misleading. Sometimes, also, it is advisable to give, in the brief, hints for the cross-examination of the witnesses expected to be called on the other side. Copies of the pleadings and notices, of the interrogatories and the answers to them, and of all material correspondence, should accompany the brief; a list of these documents, if they be numerous, should be given on the first page of the brief, or in its fold. The correspondence should be copied bookwise, each letter on a separate page, and the whole arranged in one bundle in strict chronological order.

As soon as counsel is briefed he has authority to act as his client's representative in all matters involved in the litigation. See *ADVOCATE*. The terms of any compromise agreed on should be carefully indorsed on each brief, and signed by the leading counsel on the other side. So, if the action be fought out, counsel should always indorse the result on his brief. If the indorsements on the two briefs differ, the registrar or associate must decide which is correct. The indorsement on counsel's brief is *publici juris*, and is always open to inspection in any subsequent action, though the rest of the brief be sealed up (*Nicholl v. Jones*, 1865, 2 Hem. & M. 588; 13 W. R. 451; *Walsham v. Stainton*, 1863, 2 Hem. & M. 1; 12 W. R. 199).

**British America.**—For the British possessions in America, see the articles *CANADA*, *BRITISH HONDURAS*, *BRITISH GUIANA*; and for tabulated statement of conditions of appeals to the Privy Council, see *PRIVY COUNCIL*.

**British Burma.**—A country lying to the east of the Bay of Bengal, and inhabited by people of several races. The Burmese, who ruled the country, were converted to Buddhism at an early period. Mr. Jardine, in his *Notes on Buddhist Law*, has given it as his opinion that the customary law of Burma was of Hindu origin, based on records and customs brought from Southern India, but modified in its application to a Buddhist people. The same opinion is maintained in Dr. Forchhammer's *Burmese Law*. Some of the authoritative texts are given in Sangermano's *Burmese Empire*, published at Rome in 1833, and republished at Rangoon in 1885. An argument turning on a point of Burmese law will be found in L. R. 11 Ind. App. 109. The Karens have a customary law of their own; so also have the Chins. An account of the customs of the Chins has been published at Rangoon, with a preface by Mr. Jardine.

Early in the present century, the Burmese conquest of Arakan brought the rulers of the country into contact with our Indian Empire. Unable to obtain redress for outrages committed on traders, the British Government invaded the country in 1824, and annexed Arakan and Tenasserim. Pegu and Martaban were added in 1853, and in 1862 these four were formed into one province (British Burma) under a chief commissioner. Upper Burma remained independent until the war with King Thebaw in 1885; it was

annexed by proclamation dated 1st January 1886. The whole of Burma is now under one chief commissioner. There is a Recorder at Rangoon, a Judicial Commissioner for Upper Burma, and another for Lower Burma. There is an appeal from the Courts of the province to the Queen in Council. See PRIVY COUNCIL. For the application of Imperial and Indian legislation to Burma, see the *Burmese Laws List* and other official publications.

**British Columbia.**—See CANADA.

**British Dominions.**—A term which includes the United Kingdom and all British possessions (*q.v.*). For the history of the term as used in the Copyright Act of 1842, see *Routledge v. Low*, 1868, L. R. 3 H. L. at p. 110.

**British Guiana.**—A colony in South America, including the settlements of Demerara, Essequibo, and Berbice. The country was originally settled by the Dutch; the English settlement of Surinam was ceded to them in 1667, and still belongs to Dutch Guiana. Demerara, etc., were finally ceded to Great Britain in 1814. The western boundary of the colony is in dispute with Venezuela. Under the Dutch occupation, the Court of Policy for Demerara and Essequibo consisted of the Director-General and other official members, together with two representatives from each settlement, chosen by a college of electors in each. In 1831 this arrangement was in effect restored, and provision was made for the representation of Berbice. By a local Act of 1891, the administrative powers of the Court of Policy were transferred to an Executive Council; the Court itself now consists of the Governor, seven official members, and eight representatives elected by direct vote. The Combined Court is the Court of Policy, with the addition of six elected financial representatives. The Roman-Dutch law is the basis of the law of the colony; but English mercantile and criminal law has been introduced by statute. In 1894, a new and revised edition of the laws of British Guiana was prepared by Mr. (now Sir) J. W. Carrington. See also Dalton's *History of British Guiana*, published in 1855; and see PRIVY COUNCIL.

**British Honduras.**—A colony on the east coast of Central America, formed by settlers who were attracted by the fine timber (log-wood and mahogany). The country was claimed by Spain, and in 1763 Great Britain agreed to abandon it, but the British settlers remained, and the Spanish authorities were not able to reduce them to obedience. A superintendent was appointed by the Home Government, but this alone was not enough to make the settlement a colony, and it was in fact held not to be a colony (see Clark, *Colonial Law*, p. 2, *n.*). In 1862 British Honduras was declared a colony, and a Lieutenant-Governor was appointed, subordinate to the Governor of Jamaica. In 1884 the colony became independent of Jamaica. The Legislature now consists of the Governor and a Legislative Council. The Chief Justice is sole judge in the Supreme Court; there is an appeal to the Queen in Council and (under the Imperial Act, 44 & 45 Vict. c. 36) to the Supreme Court of Jamaica. The laws of British Honduras are English in their origin; the customs and resolutions of the original settlers

were recognised and confirmed after the visit of Admiral Burnaby in 1756; they are known as "Burnaby's Laws." See PRIVY COUNCIL.

**British India.**—A term which includes all the territories governed by Her Majesty through the Governor-General of India, or any officer subordinate to him (see the Interpretation Act, 1889, s. 18 (4)). The term does not include the territories of independent native princes. In the native States the Governor-General has only such powers as have been ceded to him by the local governments; the exercise of these powers is regulated by the Indian Foreign Jurisdiction Act of 1879; but the subjects of native princes are recognised for various purposes as persons enjoying Her Majesty's protection (Hall on *Foreign Jurisdiction*, 127 and 228 *n.*). The boundaries of British India are defined by a long series of treaties, engagements, and sanads (see the official collection, edited by Sir C. Aitchison, and published in 1892). The steps by which full sovereignty has been acquired over this vast territory may be summarised as follows:—

On the 31st Dec. 1600, the English merchants trading to the East received a charter of incorporation from Queen Elizabeth. The East India Company built its factories on land held under the Mogul and his feudatories; but the English traders never submitted themselves to Mohammedan law. In 1618 the Mogul recognised Surat as a privileged place; and in the three Presidency towns, Calcutta, Madras, and Bombay, English law was administered as in a settled colony. The island of Bombay, ceded by Portugal to Charles II., as part of his wife's dowry, was granted to the Company in 1668. In 1726 the English statute law, so far as it might be found applicable, was introduced; and each of the Presidency towns was provided with a Mayor's Court, from which there was an appeal to the governor and council, and, if the matter in dispute was over 1000 pagodas (£400) in value, to the king in council. The local jurisdiction of these Courts was limited in extent; the provinces were governed by officers who derived their authority from the Mogul. In 1765, Clive induced the Mogul to grant the Dewanny, or civil government of Bengal, to the Company. The Dewanny was nominally subordinate to the Nizamut (military power and criminal justice), which was vested in the Nabob; but the Company finally succeeded in organising a complete system of provincial Courts, including Sudder (chief) Courts of Dewanny Adawlut and Nizamut Adawlut, from which the final appeal was to the king in council. Under an Act of Parliament, 13 Geo. III. c. 63, the office of Governor-General was constituted; and, shortly afterwards, the Board of Control was established in England as a check on the political action of the Company. Under the same Act, a Supreme Court was appointed to administer English law at Calcutta. We may acquit this tribunal on some of the darker charges made against it (see Sir J. F. Stephen, *Nuncomar and Impey*), but there can be no doubt that it wrought great mischief by applying the rules of Westminster Hall to people whose customs the judges did not understand. In dealing with the Courts, the Governor-General was hampered by doubts as to his legislative authority; but regulations were passed from time to time, and combined into a code in 1793. Supreme Courts were afterwards established at Madras and Bombay.

In 1833 the trading privileges of the Company were taken away. A commission was appointed in the same year to provide India with a body of laws. To secure uniformity of legislation, the Governor-General in Council was made the sole legislative authority. In the year after the Mutiny (1858), the government of India was transferred from the Company to the

Crown; under the Royal Titles Act of 1876 Her Majesty has assumed the title of "Empress of India." In 1861, the Supreme Courts and the Sudder Courts were amalgamated to form the new High Courts; and, in the same year, a limited power of legislation was restored to the Governors of Bombay and Madras.

Executive authority over India is exercised by Her Majesty, on the advice of a Secretary of State, through the Governor-General. In subordination to the Governor-General are the Governors of Madras and Bombay (with Sind); the Lieutenant-Governors of Bengal, the North-Western Provinces, and the Punjab (with Delhi); the chief commissioners of the Central Provinces, Assam, Burma, etc. The more important places in local administration are filled by members of the Indian Civil Service (formerly known as the "covenanted" service); smaller offices by members of the local or "uncovenanted" service. The unit of administration is the district (*zillah*, or collectorship). The village is also treated as a unit in some cases, but the mode of assessment varies according to the land tenure, etc. (see Baden Powell, *Land Tenures of British India*). The distinction between "regulation" and "non-regulation" provinces is not so important as it was; the marks of a non-regulation province used to be that the chief officer had large discretionary powers, that executive and judicial duties might be combined, and that military men were qualified for civil employment.

The chief legislative authorities of British India are the Imperial Parliament and the Governor-General in his legislative council, which includes the members of his executive council, together with the additional members nominated under 24 & 25 Vict. c. 67, and 55 & 56 Vict. c. 14. The Governors of Madras and Bombay, and the Lieutenant-Governors of Bengal and the North-Western Provinces, are also assisted by legislative councils. Some notion of the scope and methods of Indian legislation may be obtained from the general introduction to Mr. Whitley Stokes's *Anglo-Indian Codes*. The law embodied in the codes and codifying Acts is the territorial law of British India, but in matters relating to marriage, succession, caste, or any religious usage or institution, the native inhabitants retain their hereditary customs and rules. See HINDU LAW and MOHAMMEDAN LAW.

The chief judicial authorities are the High Courts established in the three Presidency towns in 1861; the High Court for the North-Western Provinces, since established at Allahabad; the Chief Court of the Punjab; the Courts of the Judicial Commissioners for Oudh, etc. From the highest appellate Court of each province there is an appeal to the Queen in Council; the conditions on which the appeal may be granted are prescribed in secs. 594-616 of the Code of Civil Procedure. See PRIVY COUNCIL.

**British Islands.**—The expression "British Islands" shall mean the United Kingdom, the Channel Islands, and the Isle of Man (Interpretation Act, 1889, s. 18 (1)). This definition is in substance the same as that given in the Bills of Exchange Act, 1882, s. 4.

**British Museum.**—The great national museum and library was instituted, and is still principally regulated by the Statute 26 Geo. II. c. 22; but the nucleus of the library, the Cottonian Manuscripts, had been previously purchased for the nation (12 & 13 Will. IV. c. 7, and 5 Anne, c. 30), and lodged in Sir Robert Cotton's house at Westminster. To these were added the Sloane Collection and the Harleian Manuscripts, and by the Act first referred

to provision was made for the purchase of Montague House, the present site of the museum, and for the permanent preservation there and management of the three collections and additions to be made to them. Some of the later additions were the subject of special Acts (Townleian Collection, 45 Geo. III. c. 127; Elgin Marbles, 56 Geo. III. c. 99; Payne Knight's Collection, 5 Geo. IV. c. 60).

By the principal Act the museum and collections are vested in "the Trustees of the British Museum," who are incorporated under that name. Power was given to them to make by-laws and ordinances, statutes and rules for the purposes of the Act, and for the custody, preservation, and inspection of the collections. The trustees may act by a majority, if seven of them at least are present (27 Geo. II. c. 16, s. 3). And notwithstanding the very general language of the principal Act, which provides (26 Geo. III. c. 22, s. 20) for "free access" to be given "to all studious and curious persons, at such times, and in such manner, and under such regulations for inspecting and consulting the said collections" as the trustees direct, it has been decided that the trustees may exclude a particular member of the public from part of the museum (in the case in question, the library) without assigning any reason for doing so (*Chaffers v. Taylor*, 1896, 12 T. L. R. 278). The Act does not give members of the public the right to enter every part of the museum buildings without restriction (per Wills, J., *l.c.*).

The trustees have power to purchase and hold lands, and to accept gifts, grants, and devises of land for the purposes of the Acts relating to the museum, and for its enlargement and endowment, notwithstanding the Statutes of Mortmain (5 Geo. IV. c. 39). They are not subject to the Charitable Trusts Acts. See CHARITIES.

They are authorised to sell or give away duplicate objects which are not required for the purposes of the museum (5 Geo. III. c. 18; 41 & 42 Vict. c. 55), but this authority does not extend to objects comprised in the Royal Library presented by George IV., or in the Cracherode, Greville, or Branksian Libraries, or to any objects presented to the museum for use or preservation therein (41 & 42 Vict. c. 55, s. 3).

The great growth of the library in recent years is in part due to the vigorous enforcement of their rights under the Copyright Acts by the museum authorities. By the Copyright Act, 5 & 6 Vict. c. 45, a printed copy of every book published after the commencement of the Act, together with all maps, prints, or other engravings belonging thereto, printed and coloured in the same manner as the best copies of the same are published, and of every subsequent edition into which alterations are introduced, bound or stitched, and printed on the best paper on which the book is printed, must be delivered to the trustees at the museum within one calendar month from the date of publication if the work is published in London, within three months if it is published in the United Kingdom outside London, and if published in other parts of the British Dominions within one year (s. 6). The requirement extends to books obtaining copyright in this country under the International Copyright Act, 7 Vict. c. 12 (s. 3). In a recent case it was held that neither the trustees nor the librarian are liable to an action for libel if they catalogue and place in the library, for the use of readers, a defamatory pamphlet (*Martin v. Trustees of the British Museum*, 1894, 10 T. L. R. 338). In that case the jury found that the librarian in doing the acts complained of believed he was acting in discharge of his duty, and that he did not know, and ought not to have known, that the books contained libels. They also returned contradictory findings as to negligence. The decision was based upon the ground that there was no publication under the circumstances

of the case, but in the unlikely event of the question again arising, it can hardly be held to have been finally settled by the authority cited.

**British Pharmacopœia.**—The Medical Act, 1858, 21 & 22 Vict. c. 90, s. 54, provides that the General Council of Medical Education and Registration in the United Kingdom established by the Act shall cause to be published a book containing a list of medicines and compounds, and the manner of preparing them, together with the true weights and measures by which they are to be prepared and mixed, and such other matter as the Council think fit, to be called the British Pharmacopœia, and shall alter, amend, and republish it as they deem necessary. The Council have the exclusive right of printing and selling the book (25 & 26 Vict. c. 91), but the price to the public is fixed by the Treasury (s. 2). Any Act or Order referring to a pharmacopœia means the book so published. A printed copy is evidence (s. 3). It is illegal to compound any medicines of the British Pharmacopœia, except according to its formularies (Pharmacy Act, 1868, s. 15), unless (*semble*) they are manufactured under letters patent (*ibid.* s. 16; see CHEMIST). But the prohibition of the section cited (s. 15) does not affect a legally qualified medical practitioner, who, in order to obtain his diploma, has passed an examination in pharmacy, or a veterinary surgeon dispensing medicines for animals under his care (Pharmacy Act, 1869, s. 1).

As to the adulteration of drugs, see ADULTERATION, vol. i. p. 154.

**British Possession.**—The expression “British possession” shall mean any part of Her Majesty’s dominions, exclusive of the United Kingdom, and when parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one British possession (Interpretation Act, 1889, s. 18 (2)).

A country becomes a British possession by settlement, conquest, or cession. See the article COLONY.

**British Ship.**—The rights, duties, and liabilities connected with British ships are codified in the Merchant Shipping Act, 1894. It is not possible here to do more than call attention to the provisions relating to their ownership, management, and relation to criminal jurisdiction.

*Ownership.*—A British ship must be owned by a British subject (*q.v.*), whether natural born or naturalised, or a denizen by letters of denization, or a corporate body established under, and subject to, the laws of some part of the British dominions (s. 1). She must be registered, unless she does not exceed 15 tons burden and is engaged in British river or coasting trade, or does not exceed 30 tons burden and is employed solely in fishing or trading coastwise on the shores of Newfoundland, or in the Gulf of St. Lawrence and the coast of Canada bordering thereon (ss. 2 and 3); and she can be detained until the certificate of registry is produced. Before registration she must be surveyed, measured, and marked with her name and draught of water, and a declaration of ownership must be made. Upon registration a certificate of registration is given to her owner, containing the particulars entered concerning her in the registry-book and the name of her master; any change of her master or owner must be indorsed upon

it, and it must be surrendered in the event of her being lost or ceasing to be a British ship (ss. 19–21). For registration purposes, the property in a British ship is divided into sixty-four shares; not more than that number of individuals can be registered as owners at the same time, except that while no person may be registered as owner of a fractional part of a share, as many as five persons may be registered as joint-owners of a single share (s. 5). The right to direct the movements of the ship belongs to the majority of owners, but the minority can obtain bail for the value of their shares if she is sent on a voyage to which they object. The transfer of a registered ship must be made by bill of sale, and the transfer registered (ss. 24–26), as must any transmission of the property by death, bankruptcy, or marriage; but if a ship really exempt from registration has been registered, that does not make her liable to the conditions attaching to registered ships, *e.g.* a pleasure boat of 7 tons burden registered unnecessarily can be transferred without a bill of sale (*Benyon v. Cresswell*, 1848, 12 Q. B. 899). If a ship or a share in her is mortgaged, the mortgage must be registered; the mortgagee has an absolute power of sale over her, and the Act provides for the transfer and transmission of mortgages. If the owner wishes to sell or mortgage a ship at any place out of the country in which her port of registry is situated, he can do so by a certificate of mortgage or sale (ss. 39–46). See SHIP (*Mortgage*). In case of the owner being incapable of performing the formalities required by the Act, he can do them by his guardian or committee; no notice of any trust can be entered in the register, but equitable interests may be enforced by and against owners and mortgagees of ships (ss. 56, 57), and the beneficial owner as well as the registered owner is liable to all the duties and penalties imposed by the Act. The name of the managing owner or ship's husband must be entered in the register. The name of the ship must not be changed except by leave of the Board of Trade, nor must she be described by any other than her registered name. If she is so altered as not to correspond with her registered description, she must be registered anew (s. 48). If a ship, required by the Act to be registered, is not registered, she is not recognised as a British ship (s. 2); and the effect of this is that while, on the one hand, she is not entitled to any benefits or protection enjoyed by British ships, or to carry the British flag, or assume British national character, on the other hand, so far as regards the payment of dues, the liability to fines and forfeitures, and the punishment of offences committed on board her, she is dealt with in the same manner in all respects as if she were a recognised British ship (s. 72), *e.g.* she is not entitled to limit her liability in case of collision (*The Andalusian*, 1878, 3 P. D. 182).

*Management.*—A British ship must not conceal her national character or assume a foreign one (*The Sceptre*, 1876, 3 Asp. 269; *The Annandale*, 1877, 2 P. D. 218), or she may be forfeited to the Crown. The proper colours for a British merchant ship to carry are the red ensign, unless a warrant to carry others is granted by Her Majesty or the Admiralty. Carrying illegal colours is punishable by fine and forfeiture of those colours (*R. v. Ewan*, 1856, 2 Jur. N. S. 454); and failing to hoist proper colours if required to do so, by fine (ss. 73, 74). She is also bound to take on board distressed British seamen sent home by a consul or other authority (ss. 191–193). She must carry a duly-certified master; if of 100 tons, she must have at least one qualified mate besides; if she is foreign going and has more than one mate, they must be duly certificated; if she is a foreign-going steamship of 100 tons, she must carry two qualified



engineers, and, if less than 100 tons, one. A foreign-going ship with one hundred persons must carry a medical officer (s. 209). The owner or master of a home trade passenger ship of 80 tons burden must produce twice a year to a marine superintendent the certificates of competency of the officers of his ship (s. 103). Conditions are prescribed as regards the provisions, health, and accommodation of the crew; and in the case of ships going from the United Kingdom, through the Suez Canal or round the Cape of Good Hope or Cape Horn, the provisions and water are inspected by Board of Trade officers (ss. 198–210). Official logs are kept in every ship, in which the master must enter all the events happening on the voyage; and the official logs of foreign-going ships are delivered on their return to a mercantile superintendent. Special provisions are also made for passenger and emigrant ships (see **PASSENGERS**), for fishing boats (see **FISHING**), for the navigation of ships (see **COLLISION**). The law as to wages and discipline of the master and crew is dealt with under **SEAMEN**, and applies to unregistered British ships which ought to have been registered equally with registered ships (s. 266). Shipowners are also responsible for the proper equipment of their ships with life-saving appliances, and if the ship carries passengers with properly adjusted compasses, distress signals, etc. (s. 428–435). The Board of Trade may require the ship's draught of water to be recorded (s. 436), and in all British ships (except coasters under 80 tons burden, fishing vessels, and pleasure yachts) the deck line must be marked clearly on both sides amidships, to show the position of each deck which is above water; and a load line must be marked in the same place to show the maximum load line in salt water, which must not be submerged, whether in the case of foreign-going ships or coasters, or the ship may be detained as unsafe (ss. 437–440 and 459). Sending an unseaworthy ship to sea is a misdemeanour (s. 457), and the shipowner impliedly warrants to his crew that the ship is seaworthy to the best of his care and endeavour (s. 458). He is not liable in the case of fire or loss of valuables not declared to be so on shipment, if happening without his loss or privity (s. 502).

*Criminal Jurisdiction over British Ships.*—A British ship upon the high seas is part of the territory of England; and "all persons on board her may be considered as within the jurisdiction of that nation whose flag is flying on the ship, in the same manner as if they were within the territory of that nation" (Blackburn, J., *R. v. Anderson*, 1868, L. R. 1 C. C. 164). The jurisdiction of the Admiralty also extends over British ships in foreign rivers below the bridges, where the tide ebbs and flows, and where great ships go, although the municipal authorities of the foreign country may be entitled to concurrent jurisdiction (15 Rich. II. 3, 1391). Thus a foreigner has been convicted of manslaughter on board a British ship in the river Garonne in France, thirty-five miles from the sea, within the flow and ebb of the tide (*R. v. Anderson, supra*). Where a larceny was committed by a person unknown on board a British ship lying in the river, moored to the quay at Rotterdam, eighteen miles from the sea, a person who afterwards in England received the property so stolen was tried at the Central Criminal Court (*R. v. Carr*, 1882, 10 Q. B. D. 76); and so has a larceny on board a British ship in a Chinese river, thirty miles from the sea, though no evidence was given as to the tide flowing or where the vessel lay (*R. v. Thomas Allen*, 1837, 1 Moo. C. C. 494). The Merchant Shipping Act, 1894 (reproducing the older law), gives jurisdiction in the case of any offence committed by a British subject on board any British ship on the high seas, or in any foreign port or harbour, or by a person not a British subject on board any British ship on the high seas, to any Court

in Her Majesty's dominions within the jurisdiction of which that person is found (s. 686); and it is immaterial in what manner that person is brought within the jurisdiction, whether by force or otherwise (*R. v. Sattler*, 1858, Dears. & B. C. C. 525), unless the offence be committed in order to free himself from unlawful restraint. Sec. 687 of the same Act provides that "all offences against property or person committed in or at any place, either ashore or afloat, out of His Majesty's dominions by any master, seaman, or apprentice who at the time when the offence is committed is, or within three months previously has been, employed in any British ship, shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively . . . as if those offences had been committed within the jurisdiction of the Admiralty of England." Thus the crew of an English yacht, cast away in a storm on the high seas 1600 miles from the Cape of Good Hope, who were obliged to take to an open boat, and under pressure of hunger killed a boy, one of their number, for food, were held guilty of murder (*R. v. Dudley*, 1884, 14 Q. B. D. 273). A hulk retaining the general appointments of a ship registered as a British ship, and hoisting the British ensign, though only used as a floating warehouse, is a British ship within the above statute (*R. v. Armstrong*, 1875, 13 Cox C. C. 184). It makes no difference whether the ship be registered or not (s. 72 of the Act); it has been held to be unnecessary to produce her register, it being enough to show that she belongs to British owners and carries the British flag (*R. v. Frank Allen*, 1866, 10 Cox C. C. 405), and that evidence that the ship was a British ship of Shields, and sailed under the British flag, was sufficient, though no proof of the register or of her ownership was given (*R. v. Seberg*, 1870, L. R. 1 C. C. R. 264). But though the register, and the fact of the owner being resident in England, and the ship sailing under the British flag, afford *prima facie* evidence that the ship is British, this is rebutted by proof that the owner is not a British subject (*q.v.*), and it cannot be presumed in such a case that letters of denization (*q.v.*) or naturalisation (*q.v.*) have been granted to him (*R. v. Bjornsen*, 1865, L. & C. 545). For the extritoriality generally of British ships, see EXTERRITORIALITY.

**British Subject.**—One who owes permanent allegiance to the Crown, as distinguished from an alien owing only temporary allegiance while within the British dominions (see ALIEN; ALLEGIANCE). British subjects are either natural-born or naturalised British subjects. "By the English common law, founded on the principle of feudal ligeance and homage, none were admissible as natural-born subjects, if they were not born in a place actually possessed at the time of their birth, either by the king himself or by some prince doing homage to him for it; except, first, the children of any subjects born beyond sea who at the birth of those children should be in the service of the Crown; secondly, the sovereign's children born during the royalty of their parents; and, thirdly, the heir of the Crown wherever born" (*Appendix to Report of the Naturalisation Committee*, Part I., 1869).

Under the existing law two classes of persons are deemed to be "natural-born British subjects":—

1. Those who are such from the fact of their having been born within the dominion of the British Crown.

2. Those who though born out of the dominion of the British Crown are by statute declared to be natural-born British subjects.

British subjects by Naturalisation (*q.v.*) are "naturalised British subjects,"

and a natural-born British subject who becomes an alien in accordance with or by operation of the provisions of the Naturalisation Act, 1870, is described therein as a "statutory alien."

Subject to these distinctions, to which we shall revert later on, any person—

(1) Born within the British dominions, except the child born to an enemy father at a place in hostile occupation (*Westlake, Priv. Int. Law*, 1890, p. 323);

(2) Born on board a British ship while on the high seas or passing through territorial waters;

(3) Who, though born out of the British dominions, is the legitimate child of a natural-born British subject;

(4) Who, though born out of the British dominions of a legitimate father, also born out of the British dominions, is the legitimate grandchild of one born within the British dominions (see for (3) and (4) 4 Geo. II. c. 21; 13 Geo. III. c. 21; see *De Geer v. Stone*, 1882, 22 Ch. D. 243, for construction of these Acts);

(5) Naturalised in the United Kingdom (or a British colony, see below) in accordance with the Acts of 1870, 33 Vict. c. 14, s. 7; and 33 & 34 Vict. c. 102;

(6) Who, during infancy, has become resident in any part of the United Kingdom with a naturalised parent (Naturalisation Act, 1870, s. 10, subs. 5) or with a naturalised father while in the service of the Crown out of the United Kingdom (Naturalisation Act, 1895);

(7) Who, though by birth an alien woman, contracts a valid marriage with a British subject,—is a British subject.

The first four of the above classes of British subjects are entitled, wherever they may be, to all the rights possessed by and protection due to natural-born British subjects.

The position of the fifth (naturalised British subjects) is regulated by s. 7, subs. (3) of the Naturalisation Act, 1870, which provides that "an alien to whom a certificate of naturalisation is granted shall, in the United Kingdom, be entitled to all political and other rights, powers, and privileges, and be subject to all obligations to which a natural-born British subject is entitled or subject in the United Kingdom, with this qualification that he shall not, when within the limits of the foreign State of which he was a subject previously to obtaining his certificate of naturalisation, be deemed to be a British subject, unless he has ceased to be a subject of that State, in pursuance to the laws thereof, or in pursuance of a treaty to that effect."

Similarly, "a statutory alien," that is, a natural-born British subject, to whom a certificate of readmission to British nationality has been granted, from the date of the certificate of readmission, but not in respect of any previous transaction, resumes his position as a British subject, with the qualification "that within the limits of the foreign State of which he became a subject he shall not be deemed to be a British subject, unless he has ceased to be a subject of that foreign State, according to the laws thereof, or in pursuance of a treaty to that effect" (Naturalisation Act, 1870, s. 8).

In foreign countries recovery of nationality is not attended by such limited effects. A person who resumes his or her nationality resumes it for all purposes (*Hall, Foreign Jurisdiction*, p. 54).

To resume British nationality a statutory alien must "perform the same conditions, and adduce the same evidence as is required in the case of an ordinary alien applying for a certificate of nationality; and the Secretary of

State has the same discretion, as to the giving or withholding the certificate, as in the case of a certificate of naturalisation" (Naturalisation Act, 1870, s. 8).

The position of infant children of naturalised British subjects is not in all cases clear. Sec. 10 of the Naturalisation Act, 1870 (subs. 5), provides that "where the father, or the mother being a widow, has obtained a certificate of naturalisation in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom, *or with such father while in the service of the Crown out of the United Kingdom*, shall be deemed to be a naturalised British subject." (The words in italics have been added by the Naturalisation Act, 1895, 58 & 59 Vict. c. 43.)

Does the restriction conveyed in this wording apply to children born after, as well as to those born before, the naturalisation?

The late Mr. Hall in his treatise on the *Foreign Powers and Jurisdiction of the British Crown*, Oxford, 1894, p. 27, says, on the point in question :

"The Act is silent as to children, whether born before or after naturalisation, who are not, or at least have not been, resident with the father or mother in the United Kingdom. It is to be presumed that they remain aliens. In the case of children of a father or mother residing in the United Kingdom who have been born abroad before naturalisation of the parent, this may not be unreasonable; if a father has not chosen to have his children to live with him during a sufficient part of the five years' residence which necessarily precedes British naturalisation, it would in the majority of instances be fair to assume that he does not wish them to follow his change of nationality. But when children are born after naturalisation, there are many probable circumstances in which an assumption to this effect would be manifestly unfair. It would almost seem as if by a reaction of timidity from the anterior habit of casting too wide the net of British nationality, the framers of the Act had been not disinclined in this as in other directions to relieve the British Crown to as large an extent as possible from the burdensome duty of protection."

In short, according to Mr. Hall, the restriction applies to both, and the child born abroad, after the naturalisation, is an alien, unless such child become resident during infancy with the parent in the United Kingdom.

The same difficulty of interpretation would not exist in the case of the following provision of the Naturalisation Act, 1870, s. 10, relative to the children of British subjects on their becoming aliens: "Where the father being a British subject, or the mother being a British subject and a widow, becomes an alien in pursuance of this Act, every child of such father or mother who *during infancy has become resident in the country where the father or mother is naturalised*, and has, according to the laws of such country, become naturalised therein, shall be deemed to be a subject of the State of which the father or mother has become a subject, and not a British subject." The position of the children of persons readmitted to British nationality is determined by another paragraph of the same section of the Act of 1870, which is as follows: "Where the father, or the mother being a widow, has obtained a certificate of readmission to British nationality, every child of such father or mother who *during infancy has become resident in the British dominions* with such father or mother, shall be deemed to have resumed the position of a British subject to all intents."

In connection with this provision, Mr. Hall (*Foreign Jurisdiction*, 1894, p. 53) says:

"Children born to a British father during a period of naturalisation

abroad, and children born of a British mother during a foreign coverture, are not specifically mentioned in the Act of 1870, and it is a question whether the language of the Act can be strained to embrace them. Notwithstanding the very general terms of the fourth subsection of the tenth section, which speaks of 'every child of such father or mother who during infancy has become resident in the British dominions with such father or mother,' it is difficult to include them among the children there contemplated, because, on the most liberal construction of the words, they can hardly be 'deemed to have resumed' a national character which they never possessed; and they cannot be covered by the fifth subsection, because a certificate of readmission is carefully distinguished from a certificate of naturalisation, and the subsection in question applies only to children of persons who have received the latter. If neither the fourth nor the fifth subsections apply to the class of infants under consideration, their position must apparently be determined by the governing fact of the nationality of their parent at the moment of their birth; they have been born subjects of a foreign Power, and they must remain its subjects until they can be independently naturalised."

The illegitimate children of a British subject born in a foreign country are not British subjects, even though the laws of such foreign country permit legitimation by subsequent marriage, and the parent may afterwards have legitimated them in that foreign country by marriage with the mother.

The wife of a natural-born British subject is a British subject without distinction, but her nationality during coverture seems exclusively dependent on that of her husband. "A married woman," says the Act, "shall be deemed to be a subject of the State of which her husband is for the time being a subject" (Naturalisation Act, 1870, s. 10, subs. 1).

The status of a woman of British nationality divorced from a foreign husband is doubtful. Mr. Dicey (*Conflict of Laws*, London, 1896) holds that a divorced woman continues to be the subject of the State of which her husband was a subject immediately before or at the moment of divorce, until she changes her nationality, but he is careful to point out that the rule he attempts to lay down is formed from the Naturalisation Act, 1870, by mere inference.

A "British subject who voluntarily becomes naturalised in a foreign State ceases to be a British subject" (Naturalisation Act, 1870, s. 6). See ALIENAGE.

"Any natural-born British subject," moreover, "who at the time of his birth became, under the law of a foreign State, a subject of such State, and is still such subject, may, if of full age and not under any disability, make a declaration of alienage, and from and after the making of such declaration ceases to be a British subject" (Naturalisation Act, 1870, s. 4). See ALIENAGE; ALIEN.

This also applies, under the same section of the Naturalisation Act, 1870, to any person born out of Her Majesty's dominions of a British father.

Where a doubt exists with respect to the nationality of any person as a British subject, a special certificate of naturalisation may be granted, and that certificate may state "that the grant thereof is made for the purpose of quieting doubts as to the right of such person to be a British subject," though "the grant of such special certificate shall not be deemed to be any admission that the person to whom it was granted was not previously a British subject" (Naturalisation Act, 1870, s. 7).

As regards naturalisation in British colonies, the Naturalisation Act,

1870, s. 16, provides that "all laws, statutes, and ordinances which may be duly made by the Legislature of any British possession for imparting to any person the privileges, or any of the privileges, of naturalisation, to be enjoyed by such person within the limits of such possession, shall within such limits have the authority of law, but shall be subject to be confirmed or disallowed by Her Majesty in the same manner, and subject to the same rules in and subject to which Her Majesty has power to confirm or disallow any other laws, statutes, or ordinances in that possession."

"A colonial Act," says Mr. Hall, "would seem, therefore, on the terms of the Act of 1870, to be operative only within the particular colony in which it has been enacted, and to be incapable of investing a naturalised person with the quality of a British subject in foreign States. The Naturalisation Act does not, however, appear to have been read quite in this sense; and it has been the practice to issue passports to the owners of colonial certificates of naturalisation, and to protect them in all foreign countries other than their country of origin, on the ground, it must be supposed, that when a person is treated as a subject for all purposes in any part of the British dominions, it is impossible for the State entirely to wash its hands of him and his affairs the moment that he oversteps the boundary of the empire" (*Foreign Jurisdiction*, pp. 28, 29).

The Indian empire is not mentioned in the Act of 1870, and naturalisation within its territory is provided for by a local Act, under which the applicant for naturalisation is obliged only to be "settled in the territories, or residing within the same with intent to settle." It is simply stated, without mention of the position of a naturalised person in any foreign country, that he shall, "within the territories, be deemed a natural-born subject of Her Majesty as if he had been born within the said territories, and shall be entitled, within the said territories, to all rights, privileges, and capacities of a subject of Her Majesty born within the said territories. . . ." "The subsequent British Act of 1870," says Mr. Hall (*Foreign Jurisdiction*, pp. 28, 29), "must be held to be a general statute, governing and supplementing the Indian law, the intention of the British Act being too general, and the scope of the term territory too wide, to permit of the Indian Act being read independently. Its effect must therefore," he concludes, "be limited in the same manner as is the effect of colonial laws, and the position abroad of a person naturalised under it must be the same as that of a colonially naturalised person" (pp. 30, 31).

**Broad Arrow.**—See PUBLIC STORES.

**Brocage — Brokerage — Marriage Brokerage Contracts.** — Contracts for procuring marriages for reward; such contracts are illegal and void, as being contrary to public policy (*Hall v. Potter*, 6 Will. III. 3 Lev. 411, 4th ed., Show. P. C. 98; *Stribblehill v. Brett*, 1703, 2 Vern. 445; *Cole v. Gibson*, 1750, 1 Ves. 503).

If a man undertakes to pay a sum of money to another, on condition that he will bring about a certain marriage, the instrument is void, whether the condition, cause, or consideration does or does not appear upon the face of it (*Collins v. Blantern*, 1767, 2 Wils. 347; *Arundel v. Trevillian*, 10 Car. I. 1 Ch. R. 47; *Drury v. Hooke*, 1686, 1 Vern. 411).

A bond given by the husband to the wife's father, as the consideration

for his consent to the marriage, has been held to be in the nature of a marriage brokerage contract (*Keat v. Allen*, 1707, 2 Vern. 588).

So a covenant by a husband before marriage to release his wife's guardian of all accounts respecting her expenditure was held not binding, as being within the same reason as a marriage brocage agreement (*Hamilton v. Mohun*, 1710, 1 P. Wms. 120).

A lease granted in consideration of the procurement of a particular marriage will be set aside, and the estate discharged of the lease (*Stribblehill v. Brett*, *supra*).

**Broker.**—*Definition.*—A broker is an agent employed to negotiate and make contracts on behalf of his principal, and, in general, contracts of sale or purchase. He is not put into possession of the property to be sold as a factor is (*Baring v. Corrie*, 1818, 2 Barn. & Ald. 137; 20 R. R. 383; *Stevens v. Biller*, 1883, 25 Ch. D. 31; Smith, *Mercantile Law*, 10th ed., p. 118). See FACTOR.

His trade is to find purchasers for those who wish to sell, and vendors for those who wish to buy, and to negotiate and superintend the making of the bargain between them (Blackburn on *Sale*, quoted by Hannen, J., in *Mollett v. Robinson*, 1872, L. R. 7 C. P. at p. 97). Formerly brokers within the city of London were required to be admitted to trade by the Lord Mayor and Aldermen (6 Anne, c. 16; 57 Geo. III. c. 60), but this requirement is now abolished (London Brokers' Relief Act, 1884). An auctioneer (*semble*, *Wilkes v. Ellis*, 1795, 2 Black. H., 555), a merchant who acts upon commission from a correspondent abroad (*semble*, *Janssen v. Green*, 1767, 4 Burr. at p. 2104; and see *Stevens v. Biller*, *supra*), and a person employed to hire workmen (*Milford v. Hughes*, 1846, 16 Mee. & W. 174) were not brokers within the meaning of the statutes of Anne and George. A broker is a "mercantile agent" within the meaning of the Factors Act (Factors Act, 1889, s. 1), but he is not, as such, intrusted with possession, and accordingly cannot sell or pledge goods of his principal under the Act (*Cole v. London and North-Western Bank*, 1875, L. R. 10 C. P. 354).

*Authority.*—The customary authority of a broker to bind his principal is so well settled as to be no longer a question of fact dependent on evidence of usage, but a constituent part of that branch of the common law known as the law merchant (*q.v.*). There are still, however, some points in which the limits of his authority are not fully determined, and on which evidence of usage would have a controlling influence in deciding on the rights of the parties (quoted from Benjamin on *Sale*, 4th ed., p. 249). The usage must be reasonable and lawful (see *Mollett v. Robinson*, cited below). Thus in *Dickinson v. Lilwall* (1815, 4 Camp. 279) a usage in the Irish provision trade, according to which the broker's authority to sell expired on the day it was given, and in *Baines v. Ewing* (1866, L. R. 1 Ex. 320) a usage affecting Liverpool insurance brokers, and limiting the sums for which they can bind their principals, were proved and acted upon. So, on the other hand, the rule being that a broker has no authority to buy or sell in his own name (*Baring v. Corrie*, 1818, 2 Barn. & Ald. 137; 20 R. R. 383), by custom he may be authorised to do either or both (*Johnson v. Usborne*, 1841, 11 Ad. & E. 549; *Bostock v. Jardine*, 1865, 3 H. & C. 700; *Cropper v. Cook*, 1868, L. R. 3 C. P. 194). The broker's authority, as between himself and his principal, may, of course, be in any way limited or extended by the instructions of his principal, but a third person dealing with the

principal through the broker is entitled, in the absence of notice of the contrary, to assume that the broker has the customary authority. See **PRINCIPAL AND AGENT**.

The broker has authority to buy or sell subject to the lawful and reasonable customs of the market in which he deals, and to bind his principal accordingly, *e.g.* to sell according to the reasonable rules (*Hodgkenson v. Kelly*, 1868, L. R. 6 Eq. 496) and usages (*Young v. Cole*, 1837, 3 Bing. N. C. 724) of the London Stock Exchange. But the principal is not bound by any usage which would change the intrinsic character of the contract unless he has agreed to it, as by employing the broker to buy in a market where he knows it exists (*Benjamin*, p. 211; *Mollett v. Robinson*, 1875, L. R. 7 H. L. 802, where the usage put forward was for a broker employed to buy for several principals, to buy for himself and resell to them). (See an article in the *Solicitors' Journal*, 1897, on "Usages of Brokers.") He is agent to sign the memorandum required by the Statute of Frauds (now the Sale of Goods Act, 1893, s. 4), on behalf of both parties to the contract (*Benjamin*, p. 249; *Thomson v. Gardiner*, 1876, 1 C. P. D. 777) [see **BOUGHT AND SOLD NOTES**], but not after his authority is countermanded (*Farmer v. Robinson*, 1805, 2 Camp. 338 n.). His clerk has no such implied authority to sign (*Henderson v. Barnewall*, *infra*). In *Henderson v. Barnewall*, 1827, 1 Y. & J. 387, where a broker's clerk had brought the parties together, and they dictated the contract to him, it was held that the broker himself had no authority to sign for the parties. The broker has also authority to sell on credit where credit sales are customary, but not otherwise (*Wiltshire v. Sims*, 1808, 1 Camp. 258; 10 R. R. 673; *Houghton v. Matthews*, 1803, 3 Bos. & Pul. 489; 7 R. R. 815; and see *Brown v. Boorman*, 1842, 3 Q. B. 511; 11 Cl. & Fin. 1). Such sales of stock or shares, for instance, are not customary (*Wiltshire v. Sims*, *supra*). If goods are sold on credit to an unnamed purchaser, the vendor may, by custom, retract, if, on inquiry within a reasonable time after learning the purchaser's name, he is dissatisfied of his sufficiency. The custom was formed by a special jury in London in 1810 (*Hogson v. Davies*, 2 Camp. 530). *Benjamin*, p. 270, suggests that it would now be judicially recognised.

He has authority to receive payment for an undisclosed principal, according to the terms of the sale (*Campbell v. Hassell*, 1816, 1 Stark. 233), but not by way of set-off against a debt due from the broker (see *Pearson v. Scott*, 1878, 9 Ch. D. 198; *Cooke v. Eshelby*, 1887, 12 App. Cas. 271, and the cases there cited). But no authority, unless by special custom, to receive payment for a disclosed principal (*Mynn v. Joliffe*, 1834, 1 Moo. & R. 326; *Brown v. Boorman*, 1842, 3 Q. B. 511; 11 Cl. & Fin. 1). Such special custom exists in the case of an insurance broker (*Provincial Insurance Co. v. Leduc*, L. R., 1874, 6 P. C. 224, and see below, *Rights against Third Party*).

Payment by the buyer to his own broker, who fails to pay the seller, only operates to discharge the buyer's obligation to the seller if the seller has given credit to the broker exclusively, or is estopped from demanding payment from the buyer by reason of having by his conduct induced him to pay the broker, in the belief that the broker had already paid the seller, or that the seller had authorised the buyer to pay the broker (*Irvine v. Watson*, 1880, 5 Q. B. D. 103, 414; *Davison v. Donaldson*, 1882, 9 Q. B. D. 623). So a London broker dealing with a country broker is not discharged (except under the circumstances aforesaid) by a payment to the country broker, if he knows that the latter is acting for a principal, any usage to the contrary notwithstanding (*Crossley v. Magniac* [1893], 1 Ch. 594; *Anderson*



v. *Sutherland*, 1897, 13 T. L. R. 163). But if the broker is not known to be acting as a broker, and is, in fact, dealt with as being himself the principal, payment to him by set-off or otherwise, without notice of his agency, is an effectual discharge of the person paying (*Montagu v. Forwood* [1893], 2 Q. B. 350).

A broker has no implied authority to contract in his own name (see above); or to cancel (*Xenos v. Wickham*, 1866, L. R. 2 H. L. 296) or alter contracts made on his principal's behalf, for his authority is, in general, exhausted so soon as the contract is made (*Blackburn v. Scholes*, 1810, 2 Camp. 343; 11 R. R. 723). If he alters a bought or sold note without the authority of the party to be charged, it is destroyed, whether the alteration be fraudulent or not (*Benjamin*, p. 272; *Powell v. Divet*, 1812, 15 East, 29 R. R.; *Mollett v. Wackerbath*, 1847, 5 C. B. 181). But, as regards a third person dealing with a broker, when the principal is undisclosed, a variation of the contract agreed to by the broker would be effective (*Blackburn v. Scholes*, *supra*). He cannot join several principals in one contract to buy or sell, for no one principal could intervene and enforce such a contract (*Bostock v. Jardine*, 1865, 3 H. & C. 700). And he cannot delegate his authority to another (*Cochran v. Irlam*, 1814, 2 M. & S. 301; 15 R. R. 257).

A sale of his own property to his principal, or a purchase of his principal's property for himself, without the knowledge of the principal that the broker is the other party to the bargain is void, and any custom to the contrary is unreasonable (*Hamilton v. Young*, 1881, 7 L. R. Ir. 289; *De Bussche v. Alt*, 1877, 8 Ch. D. 286, cited under ACQUESCENCE).

*Duty.*—The broker's duty is to obey his instructions, and to exercise his implied authority (see above), so far as it is not inconsistent with his instructions, to the best of his power for his principal's benefit, and to act in accordance with such authority and not otherwise (*Brown v. Boorman*, 1842, 3 Q. B. 511; 11 Cl. & Fin. 1; *Dufresne v. Hutchinson*, 1810, 3 Taun. 117). For instance, if he ought to receive payment in cash, he should not take a cheque (see CHEQUE, *Payment*); and if he ought to receive cash or a cheque, he should not take a bill (*Hine v. Steamship Insurance Syndicate*, 1895, 72 L. T. 79). If it is customary to estimate the value of the goods to be sold for the purpose of fixing a reserve, and to communicate his estimate to his principal, he ought to do so (*Solomon v. Barker*, 1862, 2 F. & F. 726). It is not his duty in the absence of usage or special agreement to see to the delivery of goods sold (*Brown v. Boorman*, 1842, 3 Q. B. 511; 11 Cl. & Fin. 1), or to inspect and determine upon the quality of goods bought (*Zwilchenbart v. Alexander*, 1861, 1 B. & S. 234; *Pappa v. Rose*, 1871, L. R. 7 C. P. 32, 525), or upon the genuineness of stock purchased (see *Smith v. Reynolds*, 1892, 66 L. T. 808, affirmed in H. L. 9 T. L. R. 494). He is employed to negotiate and effect a contract such that his principal can enforce it against the other party (*Bostock v. Jardine*, 1865, 3 H. & C. 700, cited *supra*), and accordingly he ought to make and sign a proper memorandum of the contract where writing is material (see above, and BOUGHT AND SOLD NOTES). A custom for brokers to disregard a rule of law, e.g. Leeman's Act (see BANK SHARES), is void (*Perry v. Barnett*, 1885, 14 Q. B. D. 467; 15 Q. B. D. 388; *Neilson v. James*, 1882, 9 Q. B. D. 546).

The broker, as any other agent, must account to his principal for any secret profit he makes in the course of his agency beyond his agreed commission (see PRINCIPAL AND AGENT), but he may accept and retain a customary remuneration paid by the other party if his principal is aware that a remuneration is paid to him by the other party (*Baring v. Stanton*, 1876, 3 Ch. D. 502; *Great Western Insurance Co. v. Cunliffe*, 1869, L. R. 9 Ch. 525).

*Liability to Third Party.*—As a general rule a broker, known to be contracting as such, is not liable to the other party on the contract (see *Fleet v. Murton*, 1871, L. R. 7 Q. B. 126). But if he contract without disclosing, and without the other party being aware, that he has a principal, he is personally liable, and the principal is also liable (Benjamin, p. 206), and can both be sued and sue (*ibid.*) on the contract. And if, it being known that he is an agent, he chooses to sign a written contract, or a memorandum required by the Statute of Frauds, in his own name, he will be personally liable (*Higgins v. Senior*, 1841, 8 Mee. & W. 834). If the contract is verbal (subject to any custom such as is next referred to), it is a question of fact whether the broker's contract was made by him personally or as agent (cp. *Jones v. Littledale*, 1837, 6 Ad. & E. 486). Signing an invoice does not necessarily bind the agent personally (*Holding v. Elliot*, 1860, 5 H. & N. 117; distinguishing *Jones v. Littledale*). And by custom, where the broker is known to be contracting as agent only, but does not disclose the name of his principal at the time of the contract, he may be held personally liable as well as his principal (*Pike v. Ongley*, 1887, 18 Q. B. D. 709). In the absence of such custom a broker who signs a bought or sold note "as broker," or referring to his principals (although without naming them), is not personally liable on the contract (*Southwell v. Bowditch*, 1876, 1 C. P. D. 374). See generally on this head the notes to *Thompson v. Davenport*, in 2 Smith, *Leading Cases*, and PRINCIPAL AND AGENT.

A commission merchant has no power, unless expressly so authorised, to pledge his foreign principal's credit, and he (the agent) is solely liable, and solely entitled to sue upon the contracts he makes on his foreign principal's behalf (*Armstrong v. Stokes*, 1872, L. R. 7 Q. B. 598; *Hutton v. Bullock*, 1873, L. R. 8 Q. B. 331; 9 Q. B. 572; cp. *Malcolm v. Hoyle*, 1893, 63 L. J. Q. B. 1).

As to the liability of the broker as being in part his own principal, and for breach of warranty of authority, see PRINCIPAL AND AGENT. As to a broker's liability in an action for conversion, see CONVERSION, and *Hollins v. Fowler*, 1872, L. R. 7 Q. B. 616; 7 H. L. 757; and *Barker v. Furlong* [1891], 2 Ch. 172.

*Rights against Third Party.*—Where a broker gives a contract note describing himself as acting for a named principal, he cannot sue personally on the contract (*Fairlie v. Fenton*, 1870, L. R. 5 Ex. 169), and *semble* not even if the principal is undisclosed (Benjamin, p. 211; *Sharman v. Brandt*, 1871, L. R. 6 Q. B. 720). In the latter case he can show that he is the real principal, and consequently can sue (*Schmaltz v. Avery*, 1851, 16 Q. B. 655; Pollock on *Contracts*, 6th ed., p. 106). In *Sharman v. Brandt*, *supra*, there are *dicta* to the contrary which are adopted by Benjamin, p. 211. The actual decision in that case was that a memorandum signed by the plaintiff was not sufficient to satisfy the Statute of Frauds, and if he were a principal it is obvious that he could not be the other party's agent to sign it. But if a broker contract in his own name, even though he is known to be an agent, he may sue and be sued (Benjamin, p. 211).

An insurance broker may, by an exception to the ordinary rule, sue in his own name for premiums (*Power v. Butcher*, 1829, 5 Man. & R. 327).

*Rights against Principal.*—A broker is entitled, in the absence of agreement, to be paid the customary commission in respect of the work he does, or upon a *quantum meruit* if there is no customary remuneration. But he is not entitled to commission merely for introducing another broker who, upon an independent employment, carries through the transaction, and a custom to charge commission under such circumstances would be unreasonable.

(*Gibson v. Crick*, 1862, 1 H. & C. 142). If the principal revoke the broker's authority before he has carried through the transaction for which he was employed, and the broker's remuneration depended upon his completing the transaction, in the absence of an agreement, express or implied, to the contrary, the broker will have no claim to remuneration or damages (see *Simpson v. Lamb*, 1856, 17 C. B. 603), though he may recover his actual expenses (*l.c.*). In a case where the plaintiff was employed as the stockbroker of a company to sell a quantity of their shares, and he was to be paid a lump sum for selling them all, it was held in effect that there was an implied agreement that his employment should not be revoked till he had had an opportunity of selling all the shares, and the company being wound up before all the shares were sold, he was held entitled to recover a sum proportioned to the shares he had actually sold (*Inchbold v. Western Neilgherry Co.*, 1864, 17 C. B. N. S. 733).

No commission can be claimed for effecting an illegal contract (*Allkins v. Jupe*, 1877, 2 C. P. D. 575); and by the Gaming Act, 1892, any contract to pay money by way of commission, fee, reward, or otherwise in respect of a gaming contract within 8 & 9 Vict. c. 109, or of any services in relation thereto, or in connection therewith, is void (see GAMING). But a broker is not incapacitated from recovering his commission by failing to send properly stamped contract notes in accordance with the Customs and Inland Revenue Act, 1888, s. 17 (1) (*Learoyd v. Bracken* [1894], 1 Q. B. 114).

A broker is entitled to be fully indemnified by his principal against all liabilities properly incurred by him in the course of his agency (*Smith v. Reynolds*, 1892, 66 L. T. 808, *affd.* in H. L. 9 T. L. R. 494), but not against liabilities in respect of illegal contracts (*ex parte Mather*, 1797, 3 Ves. 373), or gaming contracts (see last paragraph, and *Thacker v. Hardy*, 1879, 4 Q. B. D. 685; *Read v. Anderson*, 1884, 13 Q. B. D. 779, the actual decision in which is no longer law), or liabilities due to his own default (*Duncan v. Hill*, 1873, L. R. 8 Ex. 242; *cp. Hartas v. Ribbons*, 1889, 22 Q. B. D. 254), where the principal elected to ratify the contract in respect of which the broker had made default, and accordingly was held liable to indemnify him.

A broker (other than an insurance broker) has a particular lien on property which comes into his possession on account of his principal for what is due to him in the transaction in connection with which he receives the property (*Thompson v. Beatson*, 1823, 1 Bing. 145); and an insurance broker has a general lien in respect of all moneys due to him from his principal on the policy moneys (*Mann v. Forrester*, 1814, 4 Camp. 60; 15 R. R. 724; *Smith, Mercantile Law*, 10th ed., p. 703), unless he has notice that his principal is himself only an agent (*Mildred v. Maspons*, 1883, 8 App. Cas. 874; *Man v. Shiffner*, 1802, 2 East, 523), in which case he has only a lien to the extent of his principal's balance against his principal's principal (*l.c.*), but in any case he has a lien for the premiums he has paid and his commission (*Mildred v. Maspons, supra*). A stockbroker has a general lien on all securities deposited with him (*Jones v. Peppercorne*, 1858, John. 430).

As to pledges of his customers' securities by a stockbroker, see BANKER AND CUSTOMER (*Lien*).

As to the employment of a broker by a trustee, see *Speight v. Gaunt*, 1883, 9 App. Cas. 1, and Trustee Act, 1893, s. 24.

See generally on brokers, Bowstead on *Agency* (to which the writer of the above article is indebted for reference to a number of the authorities cited), and DISTRESS BROKER; BROKER, INSURANCE; and STOCKBROKER.

**Broker (Insurance).**—Marine insurance is generally effected through the medium of insurance brokers, who get the insurers or underwriters to insure risks on behalf of the assured, and are “the middlemen between the assured and the underwriter.” “The broker is, however, not merely an agent; he is a principal to receive the money from the assured and to pay it over to the underwriter” (Bayley, J., *Power v. Butcher*, 1830, 10 Barn. & Cress. 329). The course of dealing between the three parties is thus concisely stated by Phillips: “The premium on a marine policy is due from the assured to the broker, and from the latter to the underwriter. The broker has an action against the assured for the premium, and the underwriters against the broker. All other claims and liabilities arising on the policy are between the assured and the underwriter” (*Insurance*, 507, 508). The legal position of the three parties thus resembles a triangular duel; for the underwriter can only have recourse to the broker for his premiums, the acknowledgment in the ordinary policy of having received the premium being conclusive as between the assured, for whom the policy is made, and the underwriter (*Dalzell v. Mair*, \*1808, 1 Camp. 532); and this rule of law applies by the custom of Lloyds to a policy containing a covenant by the assured to pay the premium to the underwriter (*Univ. I. C. of Milan v. Merchants M. I. C. L.*, 1896, 2 Com. Cas. 28, Collins, J.). The broker, in his turn, can only resort to the assured for the premiums; while the assured can sue the underwriter directly for losses and returns of premium for short interest. The course of business between the parties may, however, alter this, if, as is generally the case, running accounts are kept between the broker and underwriter, on the one hand, and between the broker and the assured on the other; and the rights of the assured against the underwriter may be materially qualified if the assured allows claims which belong to him to go into the account between the broker and underwriter, *e.g.* if the policy be left in the hands of the broker for adjustment, the custom of Lloyds allows the underwriter to be discharged from his liability on its being passed into the account between him and the broker, and the assured can then only have recourse to the broker for the money owing to him (*Scott v. Irving*, 1830, 1 Barn. & Adol. 605; *Macfarlane v. Giannocopoulos*, 1858, 3 H. & N. 860; *Sweeting v. Pearce*, 1859, 9 C. B. N. S. 534).

*As between Broker and Underwriter.*—The course of business is for two accounts to be kept, the parties arranging into which the premium on the particular policy is to go. The one is called the credit account: if the premium goes into this, it is not payable before the end of the year, and the account is made up by debiting the broker with premiums and the underwriter with the losses and returns of premium, the broker receiving a brokerage of 5 per cent. on the premiums and paying any balance against him under a discount of 12 per cent. (*Beckwith v. Bullen*, 1858, 8 El. & Bl. 685; *Great Western I. C. v. Cunliffe*, 1874, L. R. 9 Ch. 525). The other is called the cash account: if the premium goes into this, the account is settled up at the end of each month, the broker paying the balance against him, receiving a discount of 10 per cent. for ready money, and a brokerage of 5 per cent. on the premiums (*Baring v. Stanton*, 1876, 3 Ch. D. 502). The effect in law of this is that the underwriter gives the broker credit for the premium when the policy is made, and he is regarded as having paid it to the underwriter and then having it lent him again; and for this reason the premium is always taken between the assured and underwriter as paid except in the case of fraud between the assured and the broker (*Mann v. Simeon*, 1810, 3 Taun. 497; *Fry v. Bell*, 1811, 3 Taun. 492). Per Lord Wensleydale in *Power v. Butcher*, *ante*; *Blackburn, J., Xenos v.*

*Wickham*, 1864, 33 L. J. C. P. 18). The broker stands in the shoes of the assured as regards liability for premiums to the underwriter; and can avail himself of any defence which the assured would have had, *e.g.* that the insurance is illegal (*Edgar v. Fowler*, 1813, 3 East, 222; 7 R. R. 433).

It follows from the rule that the broker is the underwriter's debtor for premiums, and the underwriter the assured's debtor for losses, that the broker and underwriter cannot, as a rule, set off losses against premiums, and *vice versa*, as well as from the fact that a policy of insurance, even after adjustment, is still a contract under which no fixed sum can be recovered. They can only do so in the event of one or the other going bankrupt if they have had mutual credit or dealings with each other (Bankruptcy Act, 1883, s. 38). A series of decisions on this point establish the general principle that if the broker insures in his own name, whether on his own account or on that of his principal, and whether acting under a *del credere* commission or not (*i.e.* guaranteeing the solvency of the underwriter), provided that he has a lien on the policy either by the general course of business between himself and the assured, or because he has made advances to the assured against the goods insured and consigned to him, he can, in case of the underwriter's bankruptcy, set off losses against the latter's claims to premiums; or, put shortly, the contract must be made in the broker's name, and he must have an interest in the subject of insurance. "The acceptance of bills on the credit of the consignment gives them an interest and a lien, and having a right to retain the policies, and the policies being in their own names, and the contract of the underwriter originally with them, they may bring the action in their own names; . . . they may have an interest not only by a *del credere* commission, but also by a lien" (Lord Ellenborough, *Parker v. Beasley*, 1814, 2 M. & S. 427; 15 R. R. 299; *Koster v. Eason*, 1813, 2 M. & S. 112; 14 R. R. 603; *Cumming v. Forester*, 1813, 1 M. & S. 494; 22 R. R. 157). Returns of premium may be set off against premiums, just in the same way and to the same extent as losses can; but as returns of premium may depend on the happening of events while the policy is running, they cannot often be ascertained till the risk is ended. As regards them, the broker is a mutual agent of both underwriter and assured until his authority is revoked by the assured taking the policy out of his hands, or the underwriter making him pay over the full premium to the assured, or the underwriter's death or bankruptcy. No claim can then be set off by the broker against the representatives of the underwriter which arises after that revocation of authority, *e.g.* returns of premium not adjusted before the bankruptcy, whether they became due (by the ship's arrival) before or after it (*Minett v. Forrester*, 1811, 4 Taun. 541; 13 R. R. 676; *Goldschmidt v. Lyon*, 1812, 4 Taun. 534; 13 R. R. 670; *Parker v. Smith*, 1812, 16 East, 382; 14 R. R. 366); and returns of premium accruing after the underwriter's death cannot be retained against the premium due to his executors, whether the broker acts *del credere* or not (*Houston v. Bordenave*, 1816, 6 Taun. 451; 16 R. R. 657). Quite recently it has been held that brokers who acted *del credere* were not entitled, in an action against them by the trustee of bankrupt underwriters, to recover moneys which had come into their hands *after* bankruptcy as salvage on losses paid by the underwriters *before* bankruptcy, to set off against such salvages losses on other policies which they had made with the same underwriters, on the ground that the salvages belonged to the bankrupt's estate, and the brokers only held them as trustees for the bankrupt (*Elgood v. Harris* [1896], 2 Q. B. 491, Collins, J.).

*As between the Broker and the Assured.*—The ordinary course of business

is for an account current to be kept between these two parties, the broker crediting the assured with losses due upon the insurances effected for him, and debiting him with the premiums on those insurances; and either settling up a month after the adjustment of a loss, or, if their mutual dealings are extensive, letting the balance go into a general account (*Stewart v. Aberdeen*, 1838, 4 Mee. & W. 211). The usual commission for effecting a policy is five per cent. on the premium (*Power v. Butcher*, ante). The broker may, if he acts *del credere*, get a higher commission in consideration of his guaranteeing the underwriter's solvency: this is payable at once when the contract is made, and not merely when the underwriter goes bankrupt, "that event being perfectly collateral" (Lord Ellenborough, *Carruthers v. Graham*, 1811, 14 East, 578).

As regards the broker's liability to the assured, the following points may be noticed. He is liable for breach of contract to the assured if he does not effect a policy for which he has received commission; for this purpose the assured must prove his loss just as he would have to in an action against the underwriter, and the broker may make use of any defence which the underwriter would have had (*Harding v. Carter*, 1781, Park, 4, Lord Mansfield). Even if he has undertaken gratuitously to effect an insurance, he is liable if he does it so ill that the assured gets no benefit from it, *i.e.* for misfeasance, though not for nonfeasance (*Wilkinson v. Coverdale*, 1793, 1 Esp. 75). He must show the reasonable and average amount of skill to be expected from a man of his professional position: the policy must be properly drawn up and expressed; he must know the conditions required by law and custom of trade, *e.g.* communication of all material facts (*Maydew v. Forrester*, 1814, 5 Taun. 615; 15 R. R. 597); the policy must be formal, *e.g.* properly stamped (*Turpin v. Bilton*, 1843, 5 Man. & Gr. 455); it must cover the ordinary and special risks of the voyage contemplated (*Mallough v. Barber*, 1815, 4 Camp. 150; *Park v. Hammond*, 1815, Holt, 80; 16 R. R. 658). In the usual course of business the policy is left in the hands of the broker till the loss is adjusted; and this is *prima facie* evidence of authority to him to act as the assured's agent in all matters arising on the policy, but does not empower him to cancel a policy once made (*Xenos v. Wickham*, ante). He must use all diligence in obtaining an adjustment and recovering the loss for the assured (*Bousfield v. Cresswell*, 1810, 2 Camp. 544; 11 R. R. 794). After adjustment he may be sued by the assured for the amount of the loss, even though no proof be given that he has actually received the money (*Andrew v. Robinson*, 1812, 3 Camp. 199; 13 R. R. 788; *Wilkinson v. Clay*, 1815, 4 Camp. 171; 16 R. R. 591); unless the assured by his conduct waive his right to revert to the broker (*Ovington v. Bell*, 1812, 3 Camp. 237). If the broker pays the full amount of the loss to the assured, not knowing that one of the underwriters has become bankrupt, he is prevented from recovering it back by custom of trade (*Edgar v. Bumstead*, 1808, 1 Camp. 44; 10 R. R. 713), or he may be prevented by delay in claiming it back (*James v. Swainstone*, 1809, 2 Camp. 546 n.). If the underwriter has paid the broker a loss, he cannot claim to retain it against the assured on the ground that the adventure insured was illegal (*Tennant v. Elliott*, 1797, 1 Bos. & Pul. 3; 4 R. R. 755); or dispute his title to the money he has received for him and say he received it for somebody else (*Dixon v. Hammond*, 1819, 2 Barn. & Ald. 310); or pay over to the underwriter premiums on illegal insurances which he has in his hands, when ordered not to do so by the assured (*Jenkins v. Power*, 1817, 6 M. & S. 287; 18 R. R. 375; *Edgar v. Fowler*, ante); and allowing them in account is not payment over to the underwriter. But he is justified in paying over a loss to a

party for whom, as principal, he effected the policy, even after notice that his title is disputed (*Bell v. Jutting*, 1817, 1 Moore, 155; 19 R. R. 533).

The assured, on the other hand, is liable to the broker for the commissions and the premiums on the policies, as for money paid, whether they had been actually paid by the broker to the underwriter or not (*Airy v. Bland*, Park, 36, where the Newcastle practice of insurance was shown to be the same as the London one, and that the broker was entitled to his commission of five per cent. for effecting the policy, whether the premium was paid or not by him when the policy was made). If the broker engages to effect an insurance with such names as shall be to the satisfaction of the assured, the latter cannot wait till the voyage is finished and then refuse to pay the premiums on the ground that the underwriters' names have never been submitted to him for his approval (*Dixon v. Hovill*, 1828, 4 Bing. 665).

The broker can enforce his rights against the assured by means of a lien given him by law, which may be either particular, viz. in respect of a particular policy, or general, viz. in respect of policies other than the particular one in question; and he can detain the policy in either case till his claims on it, or on others as well as it, as the case may be, are satisfied. The former lien exists whether the principal for whom the broker effects the policy be the assured himself or only his agent, whatever arrangement the assured and his agent may have made between themselves (*Fisher v. Smith*, 1878, 4 App. Cas. 1). The general lien exists only when the broker is employed directly by the assured himself or someone whom he believes to be the real assured (*Ollive v. Smith*, 1813, 5 Taun. 55; *Westwood v. Bell*, 1815, 4 Camp. 352; 16 R. R. 800; *Cahill v. Dawson*, 1857, 3 C. B. N. S. 106). It is not necessary to show that the broker had express notice that his employer was only an agent, in order to prevent his general lien attaching: it is enough if he could have reasonably inferred it; but if no proof to the contrary be given, the presumption is that the broker believed his employer to be the real assured (*Maans v. Henderson*, 1801, 1 East, 335; *Lanyon v. Blanchard*, 1811, 2 Camp. 596; 11 R. R. 808). Receiving notice of this not being the fact after receiving the premiums does not affect his right to a general lien against the real principal; but if after such notice he pays the surplus over to his immediate employer, he is liable for it to the real principal (*Mann v. Forester*, 1814, 4 Camp. 60; 15 R. R. 724). This general lien is only for the balance of the insurance between the broker and the assured, and does not extend to matters not concerned with insurance, except in case of bankruptcy, if there have been mutual credits or mutual dealings between the two parties, terminating in debts (*Rose v. Hart*, 1817, 2 Smith's L. C. 288; 20 R. R. 533; *Dixon v. Stansfeld*, 1850, 10 C. B. 413; *Eberle's Hotels v. Jonas*, 1887, 18 Q. B. D. 459). It is lost if a security is taken in its place (*Hewison v. Guthrie*, 1836, 2 Bing. N. C. 755), or the policy is allowed by the broker to go out of his possession voluntarily, by order of his principal or by pledging it, but not by consigning it to someone else to keep for him (*McCombie v. Davies*, 1805, 7 East, 5; 8 R. R. 534). It will revive on coming into his possession again, but not if, when it does so, the broker has discovered that his employer is an agent only (*Levy v. Barnard*, 8 Taun. 149; 19 R. R. 484). A broker obliged by subpoena to produce a policy on which he has a general lien in an action by his employer against the underwriter, is allowed to satisfy his lien out of the money paid by the underwriter in the event of the assured succeeding in the action (*Hunter v. Leathley*, 1830, 10 Barn. & Cress. 858).

[Arnould, *Marine Insurance*; Phillips, *Insurance*.]

**Broker (Ship).** — Shipbrokers are generally employed to negotiate the chartering of ships, and are remunerated by a commission, generally 5 per cent., on the amount of the freight; and a stipulation to this effect is often inserted in charter-parties. The broker who undertakes to get a ship chartered on certain terms is liable to her owner if he fails to do so (*Gliddon v. Brodersen*, 1883, 1 C. & E. 197), and he is not entitled to get a commission from the shipowner unless a charter-party is signed, except by proof of a custom of trade that commission is payable for bringing the two parties together, even though the contract goes off through the fault of the shipowner, who refuses to complete (*Read v. Rann*, 1830, 10 B. & L. 438; *Broad v. Thomas*, 1830, 4 Car. & P. 338). But if the broker has made a special contract with the shipowner for payment of commission on obtaining a charter-party for him, and gets a third person who is ready to contract on the terms offered by the shipowner, then if the shipowner refuses to complete, the broker can recover from him on a *quantum meruit* for the work he has done in the matter (*Prickett v. Badger*, 1856, 26 L. J. C. P. 33, a sale of land; *Inchbold v. West Neilgherry Co.*, 1864, 34 ditto. 15; *Thompson v. Clark*, 1862, 1 M. L. C. 256, a mortgage on a ship). A broker who introduces another broker who gets a charter-party for the shipowner is entitled to commission on that charter (*Kynaston v. Nicolson*, 1863, 1 M. L. C. 350, charter got through a third broker; *Wilkinson v. Alston*, 1879, 4 Asp. 191), but not if the charterer is introduced to the shipowner by a person who knew of the ship owing to his having negotiated with a shipbroker on his own account (*Gibson v. Crick*, 1862, 31 L. J. Ex. 304).

Commission is payable where the voyage described in the charter-party is only partly performed and the freight consequently not earned (*Hill v. Hitching*, 1846, 15 L. J. C. P. 251). Where a broker had received commission on a charter-party effected by another broker who had been informed about that ship by him, he was allowed to give evidence of a custom allowing him further commission on a renewal of the charter of that ship (though the charter-party contained no mention of renewal), and on a charter of a second ship made between the same parties (*Allan v. Sundius*, 1862, 31 L. J. Ex. 307). Where two brokers are negotiating at the same time between the same principals, the first to introduce them personally to each other, though these principals have communicated previously with each other, is entitled to the commission (*Cunard v. Van Oppen*, 1859, 1 F. & F. 716); and a broker who actually introduces the parties to each other will be entitled to the commission in preference to a broker who communicates with both parties, but without identifying the transaction by naming the ship and the parties (*Burnett v. Bunch*, 1840, 9 Car. & P. 620). Where the charter-party provides that a certain commission is due on the execution of this charter-party to the broker, though the broker cannot himself sue the shipowner upon the charter-party, not being himself a party to it, the charterer may, it seems, enforce this provision against the shipowner as trustee for the broker; and, if the amount of the commission is one recoverable in a County Court with Admiralty jurisdiction (see ADMIRALTY ACTION and COUNTY COURTS), may do so by an action *in rem* against the ship (*The Nuova Raffaelina*, 1871, L. R. 3 Ad. & Ec. 483). It is often stipulated in charter-parties that the ship shall be consigned to certain brokers at the port of destination; and in this case a customary commission is due to them; and where the ship was to be so consigned to brokers on the usual terms, one of which was that they shall procure homeward freight for her at a commission of 5 per cent., and the shipowners did consign her to those brokers, but at the same time agreed



with a third party as to the homeward freight, it was held that the charterers who had previously agreed with the brokers for a share in the commission on the homeward freight (but in what proportion could not be proved at the trial) could recover the commission as trustees for the brokers (*Robertson v. Wait*, 1853, 22 L. J. Ex. 209); but to have this right the broker must be expressly named in the charter-party (*West v. Houghton*, 1879, 4 C. P. D. 197). Where a ship is addressed to brokers or agents at the port of discharge or return, by mercantile usage an address commission on collecting the homeward freight and a reporting fee may be payable (*Hibbert v. Owen*, 1859, 2 F. & F. 502).

If, however, a charter-party merely provides that the ship shall be consigned to the charterer's agents at the outward port, outwards and inwards paying the usual commissions, and shall be reported on her return to the brokers who had effected the charter-party, the shipowners are not obliged to accept a homeward cargo, and the agreement only amounted to saying that if they decided to do so, the charterer's agent should be allowed to procure and ship it, but not that they must do so (*Cross v. Pagliano*, 1870, L. R. 6 Ex. 9, Bramwell, B.); and if the charter-party provides that the ship is to be consigned to charterer's agents at the outward port free of commission on that charter, no evidence can be given of a custom of trade for commission to be paid on such a voyage for the homeward freight (*Phillips v. Briard*, 1856, 25 L. J. Ex. 233). In the absence of a special agreement to that effect the managing owner of a ship, even if he be a shipbroker, cannot charge against the ship for commissions on charters and freights (*Williamson v. Hume* [1891], 1 Ch. 390).

[Abbott, *Shipping*; Carver, *Carriage by Sea*.]

### Bronze Coinage.—See COIN, BRITISH.

**Brothel.**—There is some confusion as to the origin of this word (cp. Ital. *Bordello*; and see Murray, *Dict. Eng. Lang.*, s. vv. "Bordel" and "Brothel"). It is used in English law as a compendious term for a "common bawdy-house" (see 3 Geo. IV. c. 114), or house of ill-fame, i.e. a house or part of a house, or a room, kept for purposes of indiscriminate fornication between men and women resorting thither (*R. v. Pierson*, 1700, 1 Salk. 382; *Singleton v. Ellison* [1895], 1 Q. B. 607).

1. *Common Law.*—(a) A brothel is a variety of the genus "common ill-governed and disorderly house"; the keeping whereof is a public nuisance indictable at common law, it is said, because of its effect in drawing together the debauched and dissolute, and in corrupting public morals by open profession of lewdness (3 Co. Inst. 204), and is punishable by fine or imprisonment, which may (by 3 Geo. IV. c. 114) be with hard labour. The offender may also be bound over, with sureties, to be of good behaviour.

Coke (3 Inst. 204) gives an account of the proceedings and legislation up to his time against brothels. The killing of Wat Tyler by Sir W. Walworth is said to have been induced by that rebel's interference with the stews in Southwark, at one time belonging to the Bishop of Winchester, and made the subject of legislation in 1391 (14 Ric. II.). In 1650 by an ordinance of the Commonwealth (c. 10), the keeping of a common brothel or bawdy-house was subjected to severe punishment, including branding on a first conviction, and made a felony capital without benefit of clergy (q.v.) on a second conviction. In 1668 some ripters in London were hanged for

pulling down bawdy-houses, some of which are said by Pepys to have had wine licences from the Duke of York (*Diary*, March 24, 25; ed. Wheatley, vol. vii. pp. 374, 377, 393, 395). But there has never been in theory any licensing or toleration of such houses in modern England.

The elements of the offence are best stated in the words of the common law form of indictment still in use: "... that *A. B.*, on the            day of           , and at divers other times, as well before as after (or between that day and the taking of this inquisition), at the parish of           , in the said county, did unlawfully keep and maintain, and yet doth keep and maintain, a certain ill-governed and disorderly house; and in the said house, for his own lucre and gain, certain evil and ill-disposed persons, as well men as women, of evil name and fame and of dishonest conversation, to frequent and come together there; and the said other times there unlawfully and wilfully did cause and procure, and the said men and women in the said house at unlawful times, as well in the night as in the day there, and the said other times there to be and remain drinking, tippling, whoring, and misbehaving themselves, unlawfully and wilfully did permit and yet doth permit, to the great damage and common nuisance of all the subjects of our said Lady the Queen there inhabiting, being, residing and passing, and against the peace," etc. (1 Burn, *Justice*, 30th ed., 1399; Archb. *Cr. Pl.*, 21st ed., 1029).

The offence is within the Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17), and the Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35, s. 1), and is triable at county or borough quarter sessions (*R. v. Charles*, 1861, L. J. M. C. 69).

The indictment, unless adjourned, must be tried at the sessions or assizes for which the committal is made (25 Geo. II. c. 36, s. 10; 14 & 15 Vict. c. 100, s. 27), and the indictment is not removable by *certiorari*, except at the instance of the prosecution (*R. v. Davies*, 1794, 5 T. R. 626; 2 R. R. 683).

There is no power to award payment of costs on a prosecution on indictment, either from public funds or by the defendant, or by the prosecutor, unless the prosecution has been under the Vexatious Indictments Act, and has failed. But it is not unusual for the Treasury, on petition by the prosecutor (if a public body or officer), to allow part, usually half, of any fine imposed and levied, to be applied in payment of the costs of prosecution.

Local description of the parish in which the house in respect of which the offence is alleged is said to be still essential, and is in practice inserted, possibly to justify the parish officials, who usually prosecute, in charging the costs of prosecution on the rates (see 2. (a) below).

It is lawful to include counts for keeping several houses in the same indictment, or to add counts for keeping a disorderly house other than a bawdy-house (see 1 Burn, *Justice*, 30th ed., 1395).

It is not necessary to prove ownership to sustain a charge of keeping a brothel, and husband and wife may be jointly indicted for the offence (*R. v. Williams*, 1712, 1 Salk. 384; cp. *R. v. Dixon*, 1714, 10 Mod. 335). But the difficulties experienced in proving who was the real owner or keeper of a bawdy-house led, in 1751, to an enactment (25 Geo. II. c. 36, s. 8) declaring that a person, though not the real owner or keeper, could be prosecuted and punished as such if he at any time appeared, acted, or behaved as master, or as the person having the care, government, or management of the house. Under this provision it is common to prosecute the servants in charge of such houses.

Though the form of the indictment is, except as to place, general,

the prosecution must condescend to particularity in evidence (*Clarke v. Periam*, 1742, 2 Atk. 337, at 339; *I'Anson v. Stuart*, 1787, 1 T. R. 748, 752, 754).

It is not necessary to prove who frequents the house, and is sufficient to show that unknown persons were there behaving as charged, *i.e.* meeting for illicit sexual intercourse (*I'Anson v. Stuart*, 1787, 1 T. R. 748, at 754), nor need the indecency or disorder or misconduct be patent from the outside (*R. v. Rice*, 1866, L. R. 1 C. C. R. 21), and it is even said that evidence of its reputation as a house of ill-fame is admissible. See authorities cited in *R. v. M'Namara*, 1891, 20 Ontario Rep. 489.

The defendant is not a competent witness in a proceeding by indictment for the common law offence; but see 2. (d) below.

(b) There is some old authority (1) for the liability to indictment of persons frequenting a bawdy-house with knowledge that it is such (*Wood's Inst.* bk. 3. c. 3); (2) that a man may, without conviction, be bound to good behaviour for haunting bawdy-houses with women of ill-fame, or for keeping whores in his own house (*Dalton, Country Justice*, c. 124). Cp. the power of fining and binding over persons found in common gaming-houses; as to which, see GAMING-HOUSE.

But there is no recent precedent of resort to these remedies. And a woman is not indictable at common law as a common bawd (*R. v. Pierson*, 1706, 1 Salk. 382; 2 Raym. (Ld.) 1197), though there was a provision for such indictments in a Commonwealth Ordinance of 1650 (c. 10).

(c) Contracts to let a house for use as a brothel are illegal and void, as are contracts to supply goods, etc. for the purpose of the business, if made with knowledge of the use to which they are to be put (*Smith v. White*, 1866, L. R. 1 Eq. 626; and see *Pearce v. Brooks*, 1866, L. R. 1 Ex. 213; *Taylor v. Chester*, 1869, L. R. 4 Q. B. 309).

2. *Under Statute.*—(a) At common law any person, whether resident in or a ratepayer of a parish or not, may prosecute any brothel therein, irrespective of any personal annoyance or injury by the nuisance which it causes. But under the Disorderly Houses Act, 1751 (25 Geo. II. c. 36), alternative statutory provision was made for facilitating the prosecution of all disorderly houses (not brothels only), and for throwing the burden of the prosecution on the poor-rate. The Act was passed for three years only, but was made perpetual by 28 Geo. II. c. 19, s. 1. Under sec. 5 any two inhabitants of a parish, paying scot and bearing lot therein, may give notice in writing to a constable, or other peace-officer if there is no constable, of the parish, of any person who there keeps a bawdy-house. The officer, on receipt of the notice, must go with the two inhabitants before a justice of the peace, and, on their swearing before him to the truth of the contents of the notice, and entering into a recognisance in the penal sum of £20 to produce material evidence against the person accused, the officer must enter into a recognisance in the sum of £30 to prosecute with effect the person accused for the offence at the next assizes or quarter sessions. When this is done, the justice, without any information being laid (*R. v. Newton* [1892], 1 Q. B. 648), must grant a warrant for the arrest of the accused; and, on arrest, must bind him over to appear at the next session or assizes to answer any indictment found against him for the offence; and may take security for his good behaviour in the meantime, until the bill sent up to the grand jury is ignored or is found, and he is tried thereon (s. 6).

If the constable neglects or refuses to act upon the notice, or to prosecute effectually, or is wilfully negligent in the prosecution, he forfeits to

each inhabitant the sum of £20, recoverable by action (of debt) if brought within six months (ss. 7, 14).

If he complies with the notice, he is entitled to recover his reasonable costs of the prosecution, after allowance by two justices for the overseers of the parish. And on conviction of the offender, *i.e.* on a plea or verdict of guilty (*Jephson v. Barker*, 1886, 3 T. L. R. 40) being returned, the inhabitants are entitled to receive £10 each from the overseers. If the overseers neglect or refuse to pay the costs or blood-money on demand, double the amount due is recoverable by action (of debt), if sued for within six months (ss. 5, 14). The procedure under the Act as to venue, costs, etc., seems to be affected by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).

Legislative changes as to local government and police have caused some uncertainty as to the present effect of this statute; but in practice, scot and lot men are treated as equivalent to inhabitant ratepayers, and the constable to a member of the police force of the district, or the parish constable, if any, appointed under the 35 & 36 Vict. c. 92, s. 7, the decision in *Garlar v. Ahrbick*, 1888, 5 T. L. R. 91, being ignored as erroneous. The position of the overseers does not appear to be affected for this purpose by the Local Government Act, 1894 (56 & 57 Vict. c. 73). By a subsequent Act (58 Geo. III. c. 70, s. 7), the inhabitants are required to serve a copy of the notice with the overseers, and they are to receive reasonable notice to attend before the justice to whom the constable goes, and may, if they like, enter into the recognisance instead of the constable. If they do not, he must proceed under the earlier Act. In London it is usual for the Vestry or District Board of Works (not the guardians of the poor) to take up the prosecution, through the overseers.

(b) Under sec. 11 of the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), every person who occupies or keeps a brothel and (1) knowingly lodges or knowingly harbours thieves or reputed thieves, or (2) knowingly permits or knowingly suffers them to meet or assemble therein, or (3) knowingly allows the deposit of goods therein, having reasonable cause for believing them to be stolen, is liable to be proceeded against under the Summary Jurisdiction Acts, and, on conviction, to a penalty not exceeding £10; and in default of payment, to imprisonment for not over four months, with or without hard labour; and may also be required to enter into recognisances, with or without sureties. The special provisions of the Act as to search for stolen goods, and evidence in cases of receipt of stolen goods (ss. 16, 19), seem to apply to these offences. The limit of imprisonment being over three months, the accused can elect to be tried on indictment (42 & 43 Vict. c. 49, s. 17).

(c) Under sec. 15 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), a licensed person, even where the licence is occasional only (37 & 38 Vict. c. 49, s. 20), who permits his premises to be used as a brothel, is liable, apparently, on summary conviction, to a penalty not exceeding £20, and, on conviction, at once forfeits his licence (*R. v. West Riding Justices*, 1888, 21 Q. B. D. 258), and is disqualified for ever from holding any licence for the sale of intoxicating liquors. The offence is distinct from that (under sec. 14) of harbouring prostitutes; as to which, see PROSTITUTION.

This provision is alternative to proceedings by indictment (35 & 36 Vict. c. 94, s. 59; 52 & 53 Vict. c. 63, s. 33). The forfeiture of the licence seems to follow whether the conviction is summary or on indictment.

It was held in *R. v. Holland Justices*, 1882, 46 J. P. 312, that allowing premises to be used once for prostitution was evidence to support a summary

conviction under the enactment; but the value of the decision appears to be qualified by *Singleton v. Ellison* [1895], 1 Q. B. 607. And the evidence needed to prove the offence seems to be just the same as is required on an indictment for keeping a common bawdy-house (see *supra*, 1, 2. (a); and *Webb v. Catchlove*, 1886, 50 J. P. 795), with the addition of proof that the defendant is a licensed person, and evidence of acts or omissions showing permission or connivance. The word "knowingly" does not occur in the enactment; as to which, see *Commissioner of Police v. Cartman* [1896], 1 Q. B. 655.

(d) Under sec. 13 of the Criminal Law Amendment Act, 1885, further summary remedies were provided against persons concerned in keeping brothels and like establishments. The scope of the enactment has been much misunderstood. It deals with several distinct offences: (1) keeping or managing, or acting or assisting in the management of, a brothel (s. 13 (1)); (2) being the tenant, lessee, or occupier of any premises, and knowingly permitting the whole or any part of them to be used as a brothel, or for the purposes of habitual prostitution (s. 13 (2)); (3) being the lessor or landlord of any premises, or the agent of the lessor or landlord, and (a) letting the whole or any part of them with the knowledge that the whole or some part are or is to be used as a brothel, or (b) being wilfully a party to the continued use of such premises, or any part thereof, as a brothel (s. 13 (3)).

The first offence is substantially the same as the common-law offence as expanded by 25 Geo. II. c. 36, s. 8 (see 1. (a) above). The second, so far as it differs in substance from the first, is new. The term brothel does not apply where a prostitute is accustomed to receive male visitors in her rooms for the purpose of plying her calling (*Singleton v. Ellison* [1895], 1 Q. B. 607), but the words at the end of the clause are wide enough to make her landlady liable if she allows such use of her premises. The third offence is new, and the enactment seems meant to override *R. v. Barrett*, 1862, 32 L. J. M. C. 36, and *R. v. Stannard*, 1863, 33 L. J. M. C. 61. It has not yet been decided whether failure to determine a weekly tenancy, after notice of the illegal use of the premises, is evidence to support conviction of a landlord or his agent. As to the nature of such tenancies, see *Bowen v. Anderson* [1894], 1 Q. B. 164.

The offences as thus defined are punishable on summary conviction for a first offence by a penalty not exceeding £20, or not over three months' imprisonment with or without hard labour; and for a second or subsequent offence by a penalty not exceeding £40, or not over four months' hard labour. If convicted more than twice, he may be required to enter into a recognisance, with or without sureties, for not over twelve months, or imprisonment for not over three months in default. If the fine imposed is not paid, hard labour may be imposed in default (*R. v. Tynemouth Justices*, 1886, 16 Q. B. D. 647). The accused, if charged after a previous conviction, can elect to be tried on indictment, in which case the costs of the prosecution are payable out of the local rate (42 & 43 Vict. c. 43, s. 17).

If summarily convicted otherwise than on his own confession, he can appeal to Quarter Sessions (48 & 49 Vict. c. 69, s. 13). The procedure on appeal is regulated by sec. 31 of the Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49, and the Summary Jurisdiction Act, 1884. If tried summarily he can, besides fine or imprisonment, be ordered to pay the costs of the prosecution (11 & 12 Vict. c. 43, s. 18). Summary prosecutions may be instituted either by information in the usual manner under the Summary Jurisdiction Acts (*Kirwin v. Hines*, 1886, 54 L. T. 610), or in the manner authorised by 25 Geo. II. c. 36, and 58 Geo. III. c. 70, s. 7 (see 2.

(a) above), in which event no information is necessary, and a warrant for the arrest of the accused for any of the three offences must be granted after the ratepayers have entered into the prescribed recognisance (*R. v. Newton* [1892], 1 Q. B. 648).

The prosecution appear to be quite free, if they choose, to elect to proceed by indictment instead of summarily, where the facts go to prove the common-law offence or the summary penalties seem insufficient for the case.

The fines imposed and levied in the Metropolis before a police magistrate go to the Receiver of Metropolitan Police (10 Geo. IV. c. 44, s. 37; 2 & 3 Vict. c. 47, s. 77); in Quarter Sessions boroughs to the borough fund (45 & 46 Vict. c. 50, s. 221).

3. At common law it seems to be an indictable misdemeanour to conspire to procure the defilement of a woman (*R. v. Lord Grey*, 1682, 9 St. Tri. 127; *R. v. Mears*, 1851, 2 Den. C. C. 79). In 1885 stringent statutory provisions on this subject were enacted: (i.) Under sec. 2 (1) (3) of the Criminal Law Amendment Act, 1885, every person is guilty of a misdemeanour who procures, or attempts to procure, any woman or girl (a) to leave the United Kingdom with intent that she may become an inmate of a brothel elsewhere (*i.e.* outside the United Kingdom); (b) to leave her usual place of abode in the United Kingdom (such place not being a brothel), with intent that she may, for the purposes of prostitution, become an inmate of a brothel within or without the Queen's dominions. A conviction of these offences cannot be obtained on the evidence of one witness unless he is corroborated in some material particular by evidence implicating the accused. See CORROBORATION.

(ii.) Under sec. 6, the owner or occupier, or any person who has or assists in the control or management of any premises, is guilty of an indictable offence if he induces or knowingly suffers any girl under sixteen to resort to or be on the premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally, *i.e.* whether the case is one of procuration for an individual or for indiscriminate prostitution. Such premises need not be a brothel. A mother has been convicted under the section for permitting in her own home her own daughter to be carnally known (*R. v. Webster*, 1885, 16 Q. B. D. 134). But the section has been held not to apply where a mother allowed an offence to be committed in her house with a view to getting evidence against a man, who had already committed an offence against sec. 5 with her daughter—a girl between thirteen and sixteen (*R. v. Merthyr Tydvil Justices*, 1894, 10 Rep. 245). A girl under sixteen can apparently not be convicted of aiding or abetting or inciting to the offence with herself (see *R. v. Tyrrell* [1894], 1 Q. B. 710).

If the girl is under thirteen, the offence is felony, and punishable by penal servitude for life or not less than three years (48 & 49 Vict. c. 69, s. 6 (1); 54 & 55 Vict. c. 69, s. 1), or imprisonment with or without hard labour for not over two years; but if she is between thirteen and sixteen, it is misdemeanour only, and subject to the latter punishment.

Reasonable belief that the girl was sixteen or over is an answer to the charge (s. 2).

(iii.) Under sec. 8, every person is guilty of a misdemeanour who detains a woman or girl against her will—(1) in any premises with intent that she may be unlawfully or carnally known by any man (whether a particular man or generally), or (2) in any brothel.

A woman or girl is detained within this section, if any wearing apparel or property is withheld from her with intent to compel or induce her to remain, or if she is threatened by the accused person with legal proceedings if she takes away with her wearing apparel lent or supplied to her by him or by his direction. And no proceedings, civil or criminal, can be taken against any woman or girl within the section for taking away or being found in possession of any of such lent wearing apparel as was necessary to enable her to leave such premises. This provision was inserted to deter brothel-keepers from intimidating girls who escaped from their custody in clothes lent them for the purposes of the trade of the house.

The punishment for misdemeanour under 3. (i.), (ii.), (iii.) is imprisonment with or without hard labour for not over two years, and with or without fine (48 & 49 Vict. c. 69, ss. 2, 6, 8). The misdemeanant may also be ordered to pay the costs of his prosecution (48 & 49 Vict. c. 69, s. 18). A person convicted of felony under 3. (ii.) can be condemned in costs, and to make compensation not exceeding £100 (33 & 34 Vict. c. 23, s. 4; and 48 & 49 Vict. c. 69, s. 18).

The accused and his or her wife or husband are competent witnesses, except before a grand jury, but not compellable (48 & 49 Vict. c. 69, s. 20). The offences are within the Vexatious Indictments Acts, and the costs of the prosecution are payable out of the local rate as in felony; but the offences are not triable at Quarter Sessions (48 & 49 Vict. c. 69, ss. 17, 18).

The Court, if satisfied at the trial that the parents, guardians, or employers of a girl under sixteen have caused, encouraged, or favoured her seduction or prostitution, can deprive them of all authority over her, and appoint a guardian (48 & 49 Vict. c. 69, s. 12).

(iv.) Under sec. 10 of the Act, any justice of the peace may issue a search warrant for execution within his jurisdiction, addressed to an officer of police, authorising the search for and removal to and detention in a place of safety of any woman or girl, as to whom there is reasonable cause to suspect that she is unlawfully detained for immoral purposes, the definition whereof includes detention in a brothel (s. 8). The warrant can only be issued on sworn information by a parent, relative, or guardian of the detained person, or a person who in the opinion of the justice is *bond fide* acting in the interest of the girl, and the nature of the detention and the mode of execution are defined. The procedure is alternative to the ordinary remedy by writ of HABEAS CORPUS (*q.v.*). It has been held that no action will lie for procuring the issue of such a warrant maliciously without reasonable and probable cause (*Hope v. Evered*, 1886, 17 Q. B. D. 538; *Lea v. Charrington*, 1889, 23 Q. B. D. 45, 272); but neither decision is consonant with the ordinary rules applicable to MALICIOUS PROSECUTION (*q.v.*), and the Court of Appeal refrained in the second case from approving the first.

4. Offences relating to prostitution, which do not involve resort to a brothel or like place, are dealt with under PROSTITUTION.

5. Sexual offences with or against females, not involving prostitution, are dealt with under RAPE.

[For further authorities:—3 Co. Inst. 205; Bac. Abr. *tit. Nuisance A*; Hawk., P. C., bk. 1, cc. 74, 75; 1 Burn, *Justice*, 30th ed., 1394; Archbold, 21st ed., 1029; 1 Russ. on *Crim.*, 6th ed., 740; Steph. *Dig. Cr. Law*, 5th ed., pp. 140–146.]

● **Brougham's (Lord) Acts.**—*Slave Trading.*—The first great statute carried by Lord Brougham was the Slave Trade Felony Act,

51 Geo. III. c. 23, which made slave trading no longer a breach of the revenue laws, but a felony. See SLAVE TRADE.

*Judicial Committee and Patents Acts.*—In 1832, and 1833 he carried two Acts, 2 & 3 Will. IV. c. 92, and 3 & 4 Will. IV. c. 41, abolishing the Court of Delegates, and creating the Judicial Committee of the Privy Council a Supreme Court of Appeal for the Colonies and in Ecclesiastical Causes, and their jurisdiction was subsequently extended to patent cases, and enlarged in respect of appeals from Ecclesiastical and Admiralty Courts. See JUDICIAL COMMITTEE; PRIVY COUNCIL; APPEALS.

A bill introduced by him in 1851 to amend the patent law was subsequently adopted by the Government.

*Real Property.*—In real property his efforts to simplify conveyancing were successful in passing the Limitation of Actions Act, 3 & 4 Will. IV. c. 27, and in the great Act abolishing fines and recoveries, 3 & 4 Will. IV. c. 74, two Acts to facilitate the conveyance of real property and leases, and one rendering unnecessary the assignment of attendant terms.

*Bankruptcy.*—In 1831 he carried a bill for the administration of the bankruptcy law, by establishing the Court of Bankruptcy, and abolishing the seventy Commissioners.

*Evidence and Procedure.*—In dealing with evidence and procedure, he carried the Act 14 & 15 Vict. c. 99, enabling and compelling parties themselves to be witnesses in a civil action.

*Miscellaneous.*—Among the miscellaneous bills promoted by him, which in a modified form have since found their way into modern legislation, are his bill of 1845, disqualifying peers and members of the House of Commons from sitting and voting after issue of judgment followed by unproductive execution; a bill in 1842 to repress bribery at elections; one in 1857 to enable married women to bequeath property by will; and also a bill to prevent vexatious litigation and to improve the law of arbitration.

**Brought Alongside.**—See ALONGSIDE.

**Buggery.**—See ABOMINABLE CRIME.

**Builder.**—The word “builder” is the designation applied to a person who does the practical work of building. He bears the same relation to an architect (*q.v.*) in building matters as a practical engineer (*q.v.*) does to a civil engineer in engineering matters.

Builders often call themselves “builders and contractors,” apparently with the object of advertising themselves as being in a large way of business; but, strictly speaking, a builder is a person who builds or repairs buildings of one kind or another, in contra-distinction to contractors who construct large works, such as railways, harbour works, water works, and other large undertakings of a like nature, in which, though building is often included, yet it is only incidental to the larger work under construction.

The definition of a builder in Hudson on *Building Contracts*, p. 28, 2nd ed., is “a person who builds on his own or on another’s land for profit.” The definition in the London Building Act, 1894, is “the person who is employed to build or to execute work on a building or structure, or where no person is so employed, the owner of the building or structure” (s. 5, subs. 33).



There are various kinds of builders, but the worst is the so-called "jerry" builder, who runs up buildings in the cheapest possible way for speculation.

The qualifications which a builder should possess are very numerous; for not only must he have a thorough knowledge of building materials, but he must be able to apply them to the work he has in hand in a practical and economical manner.

He must be capable of understanding plans of all kinds for the purpose of judging of the nature of the work required to be done, and so as to satisfy himself whether the building can be constructed or not in the way the architect has designed it.

Builders, as a rule, consider that they have nothing to do with the practicability or impracticability of the architect's plans or specification, and that if the building cannot be executed, they must be paid extra for making the plans and specification practicable; but this is not their legal position.

Lord Chelmsford in the case of *Thorn v. Mayor of London*, 1876, 1 App. Cas. 120, at p. 132, remarked, "It is also said that it is the usage of contractors to rely on the specification, and not to examine it particularly for themselves; if so, it is a usage of blind confidence of the most unreasonable description."

A feature of the business of builders of to-day is that such an immense amount of work is obtained by them in competition as to necessitate the constant employment of one or more estimating clerks, whose duty it is to price out bills of quantities as they come in with invitations to tender. The builder very rarely takes out his own quantities, or does any more than put prices to each of the items in the bills of quantities supplied to him.

The accuracy of these quantities is of great importance to the builder, for he is obliged to take them on trust, a mistake therein often involving him in very serious loss, without any remedy. The name of the quantity surveyor on the back of the bill of quantities, therefore, is the best guide the builder has, and he tenders accordingly, or refuses to tender at all.

A common error under which builders labour is in thinking that if the quantities are only made part of the contract, then as a matter of course any work omitted from the quantities will have to be paid for by the building owner in addition to the contract price. This would be quite correct if the contract were to do the work and supply the materials in the quantities only, and no more; but if the contract is to complete the work according to the plans and specification as well as the quantities, then any omission from the quantities, if clearly described in the specification and shown on the drawings, would manifestly have to be done as part of the contract, just in the same way as something shown on the drawings but not described in the specification would have to be done. In the latter case, where a description is omitted from the specification, it might be doubtful with what material the work shown on the drawings would have to be executed, but it would have to be done somehow.

As to payment; builders occupy a peculiar position; they are not like merchants, who can refuse to deliver the goods unless they are paid for them. When builders day by day execute, upon the land of another, buildings and other work, they are affixing materials to the soil which cannot be removed without the consent of the owner, and they are thus left to a simple claim for money due. They cannot in England—as builders and workmen do in America—register a lien upon the property until the money is paid.

Further, in many building contracts builders are only entitled to be paid upon producing a certificate from the architect employed by the building owner. These certificates are often conditions precedent to any claim whatever, and in the absence of dishonesty or fraud of the architect or some act of the employer which prevents the architect from certifying, builders may in such cases have no remedy at all.

As to the quality of work, again, they more often than not have by the terms of the contract to satisfy the architect, and if they fail to give him satisfaction, though the work may be thoroughly well done in the opinion of any reasonable person, yet there is no remedy for the refusal of the architect to certify unless for some such reason as before stated in the case of certificates for payment.

The remedy for all these hardships of the builder's position is an arbitration clause, giving the builder a right of appeal. Clauses of this kind, though a protection to architects from many responsibilities, are reluctantly conceded by them.

A builder's risks do not cease here; he is liable to his own workmen and their families for death or injury in cases coming within Lord Campbell's Act (*q.v.*) and the Employers' Liability Act (see EMPLOYERS' LIABILITY); while he is also liable to the general public for any damage caused by the building operations, though in some cases he may have a remedy against the building owner.

Upon the death of the builder, his rights devolve upon his personal representatives, unless the work is of a personal nature, as, for instance, when he carries on or is employed in the construction of some special work, such as a lighthouse, or when the contract itself in terms is a personal one, in which case his representatives have no right to complete his unfinished work, and they may consequently be unable to recover any money unpaid at his death, if it is a "lump sum" contract.

One of the greatest difficulties with which the builder has to contend is the employment of labour. Not only has he to comply with the rules and regulations of trades union societies of all kinds and representing all trades or face a strike, but he is often obliged by the terms of the contract itself to pay the trades union rate of wages.

Architects also unwittingly prevent a builder from giving any encouragement to skilful mechanics by providing that the builder shall not sublet the work. Many a strike would be prevented if the builder were able to contract with his workmen for the execution of work by the piece or for a lump sum, because in that way the payment of wages would be avoided, and the skilful mechanic who took the sub-contract would promptly get rid of the lazy or unskilful man, for whom the trades unions require the same wages as for his more skilful brother-workman.

**Building Contracts.**—This term is generally applied to contracts for the erection and construction of buildings and other works on the land of a building owner for his use. The term building agreement is generally used in connection with building leases, and in cases where a builder undertakes to develop an estate on condition that he is to purchase or lease the land at certain prices and be advanced money on mortgage for the purpose of building.

These different kinds of contracts contain in the main similar provisions. The chief difference between a contract in which the builder is building for the employer and a contract in which he is building for himself upon the

terms that he is to receive a lease or a conveyance of the land on completion or at some fixed stage of the work, is that in the latter kind the object of the contract should be not to allow any equitable or other right to the land to be vested in the builder, whether the agreement be for purchase or lease, until the builder has performed his contract.

Engineering contracts are in their terms exactly similar to building contracts, except that from the extent of the work to be performed additional provisions require to be inserted; for, instance, in some works the plant alone before any permanent work is done amounts to thousands of pounds. Arrangements, therefore, are often made for advances to the contractor on account of the plant.

In other engineering works part payment may be made in shares in the undertaking in which the contractor is engaged.

All these different arrangements require special provisions to avoid ultimate disputes and litigation, but there are certain clauses which occur in every well-drawn contract, whether for building or engineering work. It is therefore proposed to give an outline of these clauses, explaining the reason for their use, and in that way the incidents which arise in building and engineering contracts may be dealt with without trenching upon other subjects connected with building and building contracts, which will appear under their respective heads.

In order to abbreviate as much as possible, the words "architect" and "engineer" are in most cases used synonymously, while the word "building owner" is only used where the word "employer" might imply some other employment than that of the building owner.

Contracts may be subdivided generally as follows. There are contracts for an entire work, and contracts to do as much work as ordered and no more. The latter kind presents very little difficulty in relation to building contracts, and therefore need not be considered.

Entire contracts are of two kinds: those in which the price is previously ascertained, commonly called lump sum contracts; and those in which, though the contractor is obliged to do the whole work, yet the price is to be ascertained by measuring up the actual work done and pricing the accounts made from those measurements upon the basis of a previously agreed schedule of prices.

In both cases a lump sum price is put into the contract. The difference being that in the first case the price is absolutely final and binding except for the addition or deduction of money due for duly authorised deviations, while in the latter case it is merely provisional and subject to adjustment depending upon the actual amount found on measuring up to have been executed. The latter kind is naturally much in favour amongst engineers and contractors, because it is very difficult for anyone in many of such works to foresee the exact extent of the work required to be done.

In building work, however, this kind of contract is rarely entered into, because the work can be foreseen and calculated to a nicety by the quantity surveyor employed or nominated by the building owner.

Now to deal with the conditions in building and engineering contracts generally. They have become so elaborate that it is convenient to trace how and why they are necessary.

The simplest form of contract would be one in which the contractor agreed to do certain work, according to the plans and specification, for so much money; but then arises the first difficulty. The employer does not understand the plans, and does not know good work from bad. An architect or an engineer is therefore brought into the contract, and the work

has to be done to his approval. Then the builder may not be satisfied with payment upon completion, for the work may be large, so that he would have to lock up a very large amount of capital. This difficulty is overcome by providing that the architect shall certify on account as the work proceeds, either at regular intervals, or from time to time, as soon as a certain amount of work has been done. The employer, in order to get as much security as he can for these advances, and to avoid risk of possible loss from over-certifying, or from the failure of the builder and consequent expense in calling in another contractor, then inserts a provision that all materials delivered upon the site shall become his property. With regard to delay, it is inconvenient for both parties that, upon the failure of the builder to complete to time, the only remedy of the employer should be an action for unliquidated damages, the amount of which would be very difficult and expensive to ascertain. It is therefore desirable that a penalty clause should be inserted, fixing beforehand the amount payable for each day or week's delay beyond the date for completion.

The next natural provision is that the builder should make good any defects in his work, and the builder naturally limits the time during which he is willing to do so, and thus arises the maintenance or defect clause, and the period of maintenance. Inasmuch as the building owner understands very little of the plans, he soon discovers that the building which is being erected is not what he wanted, and the necessity of a clause providing for alterations is at once apparent. Now the builder having to do work in a certain way and to the satisfaction of the architect may sometimes fail to do so, and work may be buried up and put out of sight, thus rendering subsequent condemnation very difficult. Powers are therefore given to the architect or to the building owner (or both) to cause improper work to be pulled down, and to order the removal of inferior materials. Thus arose the main clauses of building and engineering contracts, and they may be developed to any desired extent. For instance, there are twenty clauses in the conditions agreed upon between the Royal Institute of British Architects and the Builders Association, while, in some of the War Department contracts, there are thirty-five, and in the County Council contracts, there are forty-seven; and even these, if properly classified, do not exhaust the list.

The following is a more or less complete list of the clauses in common use, showing how they are subdivided:—

- |   |   |
|---|---|
|   | (a) Of the "building owner" or "employer."  |
|   | (b) Of the "contractor," whether a firm or otherwise.                                 |
|   | (c) Of the "engineer," whether for the time being or otherwise.                       |
|   | (d) Of the "assistant" or "resident engineer," or "clerk of works," and their duties. |
| (1) Definitions and interpretations, etc. | (e) Of "works," and what they include.  |
|   | (f) Of "plant," and what it includes.   |
|   | (g) Of "statutes," and what they include.   |
|   | (h) Of "in writing."  |
|   | (i) Of "documents."   |
|   | The "contract" itself.  |
|   | The "conditions."   |
|   | The "specification."  |
|   | • The "schedule of prices."   |

- |   |   |  |
|---|---|--|
| (1) Definitions and interpretations, etc.<br>—continued | { | <p>The "drawings."</p> <ul style="list-style-type: none"> <li>(1) Number and list of.</li> <li>(2) Supply of copies.</li> <li>(3) Further and detailed.</li> <li>(4) Excessive work in.</li> <li>(5) Discrepancies in.</li> <li>(6) Omissions from.</li> </ul> <p>The copies of the above to be kept on works.</p> <p>(j) Words importing the singular number to include plural number, and <i>vice versa</i>.</p> |
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|-------------------------------|---|---|
| (2) Assignment and subletting | { | Contract to be personal (if desired), not to be assigned or sublet. |
|-------------------------------|---|---|

Next follow a series of clauses which describe what the contractor has to supply and do in a more or less detailed way, and therefore should, strictly speaking, be put into the specification. Inasmuch, however, as the clauses are somewhat in the nature of conditions, they are usually inserted in the conditions probably also because they occur in every contract, and therefore may be called general.

- |   |   |   |
|---|---|---|
| (3) Things to be done, supplied, and paid by contractor | { | <ul style="list-style-type: none"> <li>(a) To give notices to owners and occupiers.</li> <li>(b) To erect hoardings and fences.</li> <li>(c) To set out the works.</li> <li>(d) To do everything necessary to complete the works.</li> <li>(e) To personally superintend.</li> <li>(f) To pay for everything.</li> <li>(g) To comply with statutes.</li> <li>(h) To pay compensation for damage.</li> <li>(i) To take all risks.</li> <li>(j) To indemnify employer.</li> <li>(k) To insure the buildings.</li> </ul> |
| (4) Everything to be done to approval of the engineer   | { | <ul style="list-style-type: none"> <li>(a) Works to approval of engineer.</li> <li>(b) Statement of general arrangements to approval.</li> <li>(c) Testing, weighing, and sorting.</li> <li>(d) Notices as to workshops.</li> <li>(e) Inspection.</li> <li>(f) Cutting into work for inspection.</li> <li>(g) Number of inspectors.</li> </ul>  |
| (5) Time for commencement and completion, and penalties | { | <ul style="list-style-type: none"> <li>(a) Giving possession of site.</li> <li>(b) Commencement and completion.</li> <li>(c) Progress.</li> <li>(d) Suspension of works by employer.</li> <li>(e) No damages for suspension.</li> <li>(f) Extension of time.</li> <li>(g) Penalties for delay.</li> <li>(h) Taking possession of site.</li> </ul>   |

- (6) Maintenance, repairs, and defects.

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|-------------------------------------|---|--|
| (7) Payment and certificates        | { | <ul style="list-style-type: none"> <li>(a) Certificates, condition precedent.</li> <li>(b) Payment of advances generally, and other advances.</li> <li>(c) " on completion.</li> <li>(d) " of balance, after period of maintenance.</li> <li>(e) Statement for advances.</li> <li>(f) " for completion.</li> <li>(g) " for balance.</li> <li>(h) Assistance in measuring.</li> </ul> |
| (8) Property in materials and plant | { | <ul style="list-style-type: none"> <li>(a) Supplied by contractor.</li> <li>(b) " by employer.</li> <li>(c) " in materials on site.</li> <li>(d) Removal of above materials respectively.</li> </ul>   |
| (9) Alterations                     | { | <ul style="list-style-type: none"> <li>(a) Alterations.</li> <li>(b) Alteration orders.</li> <li>(c) Valuation of alterations</li> <li>(d) Accounts of alterations.               <ul style="list-style-type: none"> <li>(1) Measured.</li> <li>(2) Day work.</li> </ul> </li> <li>(e) Provisional sums.</li> </ul>  |

Generally speaking, the rights and powers to arise upon default by the contractor are set out after the clause providing for performance, but it is more convenient to group all the powers.

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| (10) Powers of engineer and employer | { | <ul style="list-style-type: none"> <li>(a) To supply insufficient labour.</li> <li>(b) To rectify inferior work and remove inferior materials.</li> <li>(c) To maintain and repair.</li> <li>(d) To compromise suits and actions.</li> <li>(e) To determine the contract.</li> <li>(f) To relet it.</li> <li>(g) To make contractor pay expenses thereof.</li> <li>(h) To deduct money.</li> <li>(i) To pay expenses and costs.</li> <li>(j) To refuse to certify.</li> <li>(k) To cancel certificates.</li> <li>(l) To do works not in contract.</li> </ul> |
|--------------------------------------|---|--|

(11) Limitation and duration of powers.

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|-------------------|---|--|
| (12) Reservations | { | <ul style="list-style-type: none"> <li>(a) Statements not binding on engineer.</li> <li>(b) Progress certificates no waiver.</li> <li>(c) Contractor not released from risks.</li> <li>(d) Limitation of employer's liability.</li> <li>(e) No responsibility for quantities.</li> </ul> |
|-------------------|---|--|

(13) Bankruptcy of contractor.

- |                  |   |   |
|------------------|---|---|
| (14) Formalities | { | <ul style="list-style-type: none"> <li>(a) Resolution of corporation.</li> <li>(b) Notices, certificates, etc., in writing.</li> <li>(c) Service of notices.</li> </ul> |
|------------------|---|---|

- (15) Disputes . . . { (a) Dispute prevention.  
(b) Engineer not arbitrator.  
(c) Not bound to give reasons.  
(d) Arbitration.

- (16) Special clauses . . . { (a) Watchmen.  
(b) Police.  
(c) Payment of workmen.  
(d) All other special clauses applicable to the particular work in hand.

As to the clauses under the head of "*Definitions and Interpretations, etc.*," the following clauses are most material:—

It is essential to describe what is to happen in the case of the death of the engineer, and what powers are to be given to the employers to appoint another (whether in the event of death, illness, or dismissal), otherwise in work to be done to the satisfaction of, and to be paid for upon the certificate of, the engineer, the builder might not be able to recover any money at all if there was no engineer and no power to appoint another.

The duties of resident engineers in engineering contracts, and clerks of works in building contracts, also require to be most carefully defined. The importance of this will appear by a perusal of *Rio Janeiro Flour Mills v. De Morgan, Snell, & Co.*, reported in Hudson on *Building Contracts*, 2nd ed., vol. ii. p. 132.

Then there is a possibility of errors in the drawings, differences between the detail drawings and the contract drawings, and discrepancies between the drawings and the specification. All these contingencies must be carefully provided for. A very material point is the time when detailed drawings are to be supplied by the architect or engineer, because a failure to supply them in a reasonable time may involve an employer in an action for damages.

As to the clauses under the heading "*Assignment and Subletting*," their chief object is to prevent indifferent persons being employed upon the works; and in order to avoid the same state of things in the event of the death or bankruptcy of the builder, the contract may be made personal, so as to prevent it devolving upon his personal representative or the trustee in bankruptcy, as the case may be.

As to the clauses under the heading "*Things to be done, supplied, and paid by Contractor*," these should, properly speaking, be put in the specification. They might all be included in one comprehensive clause, except for the danger there always is in describing anything in general terms, because it opens the door to all kinds of disputes. On the other hand, detailed descriptions are equally dangerous unless they are complete.

As to the clauses under the heading "*Everything to be done to Approval of the Engineer*," they are all provisions which are found by experience to facilitate the duties of engineers and architects, in directing the method of conducting the work, and as to the inspection of materials and workmanship. To a great extent these clauses are from a legal point of view needless, because if work has to be done to approval and the contractor fails to give inspection, he cannot expect to get approval.

As to the clauses under the heading "*Time for Commencement and Completion, and Penalties*," they are all of the utmost importance. Commencement and completion are an essential part of every contract, while power to extend the time for completion is a clause partly inserted for the benefit of the employer and partly for the contractor.

It is important to give the architect this power to extend the time for all possible causes of delay, otherwise a delay by the employer for which no extension of time was provided might be a breach of contract, as, for instance, a failure to give possession of site.

The penalty clause is one which gives rise to frequent disputes, and therefore requires to be carefully worded; and in order that penalties may be deducted when delay occurs, still greater care is required on the part of the engineer or architect in the performance by him of all the conditions upon which penalties may depend.

As to the heading "*Maintenance, Repairs, and Defects*," the clause upon this subject is variously worded. A repairing clause has often received judicial interpretation under leases, and therefore its meaning is well understood. It is generally provided that the contractor shall rectify all defects which may appear within a time named.

Under the heading "*Payment and Certificates*" occur the most important clauses to a contractor in the whole set of conditions. A contractor's first thought is to see how he is to be paid; the second is to consider who is the engineer or architect who has to administer all the various onerous conditions contained in the contract; and the third is to see that an arbitration clause is inserted, if he has any doubt as to the fairness of the engineer or architect.

In small contracts a deduction of 20 or 25 per cent. is usually made from all payments to the builder on account, but as contracts increase in amount this deduction is only made until the amount kept in hand by the employer is sufficient for the purpose of his security. Thus, supposing a contract be for £2000, 20 per cent., or £400, would be only a reasonable sum to retain; but if the contract amounted to £20,000, then 20 per cent., or £4000 retention money, would be unnecessary. In large contracts it is provided, as a rule, that 20 or 25 per cent. shall be retained until the retention money amounts to a sufficient sum, and that then the contractor shall be paid the amount of further certificates in full.

This retention money is generally kept by the employer until the work is completed, when a portion of it, say half, is released and paid over to the contractor, the balance being either retained until the expiration of the period of maintenance, or paid in instalments during that period, subject, of course, to reduction, in case the contractor fails in any respect to maintain the work.

A matter which often causes considerable dispute is the time when extra works should be paid for. In the absence of any provision in the contract applicable to such work, it may be implied that such work should be paid for, either on completion of the extra work itself or upon completion of the whole contract.

A condition precedent (*q.v.*), however, to all payments is generally the certificate of the engineer or architect, and in the event of the contract being varied or altered, a previous valuation by the engineer (if so stipulated, or by an arbitrator in case of dispute, in contracts in which there is an arbitration clause), is generally another condition precedent to payment. See ARBITRATION.

The forms of certificates are different in engineering and building contracts. In the former, measurements are arrived at by the contractor and the engineer, or the resident engineer on his behalf, and these are made part of the certificate. Such measurements, as the work proceeds, are continued to be taken, the fresh measurements being added to those in the preceding certificate, but all these measurements are subject to



correction in the final certificate. In building contracts, though in some cases accurate measurements are taken, yet they rarely appear on the face of the certificate, which merely shows that a round sum is due to the builder on account.

The clauses under the heading "*Property in Materials and Plant*" are framed chiefly for the purpose of creating a better security for advances. It is provided that all materials as and when delivered upon the site of the works shall become the property of the employer, and then, if the builder should become bankrupt, the right of the employer to the materials cannot be defeated by a claim by the trustee in bankruptcy. A right to seize on bankruptcy materials which had not been previously vested in the employer would be void under the bankruptcy laws, and hence the necessity of the previous vesting clause.

Under the heading "*Alterations*" appear those clauses which are so necessary to an employer to enable him to vary the work in the contract; and in order to prevent the builder from saying that the ordinary directions of the architect as to the method of performing the work on the contract are extras, it is generally stipulated that the contractor shall not be entitled to extra payment unless a written order shall have been given to him to that effect.

This stipulation often presses hardly upon a contractor, for, relying upon promises by the engineer or architect that extras will be allowed him, he may omit to obtain the necessary written order, only to find when the accounts are made up that he has no legal claim whatsoever for extras.

The builder and contractor often thinks that work indispensably necessary to complete the contract, but not particularly specified, is an extra work for which he is entitled to be paid; but here he is mistaken. For instance, if a contractor had agreed to do a work in a particular way and then found it impossible, and the engineer gave him fresh plans to enable him to do it in another way, this would not entitle him to extra payment, the act of the engineer in such a case being a concession to the contractor (see *Sharpe v. San Paulo Ry. Co.*, 1873, L. R. 8 Ch. 597; and Hudson on *Building Contracts*, 2nd ed., vol. i. p. 362).

As to the clauses under the heading "*Powers of Engineer and Employer*," it is necessary in contracts of the complicated nature of building and engineering contracts to provide what is to happen upon the breach by the contractor of any of the numerous covenants on his part. The clauses inserted for this purpose require considerable technical skill in drafting. They are weapons which must be made to suit the use to which they are to be put and the person who has to use them. These powers in the hands of a perfectly fair-minded engineer or architect will, if properly framed, bring the recalcitrant contractor or builder to his senses, but if used as weapons of oppression would as speedily injure the employer, whom they are intended to protect.

Under the heading of "*Limitation and Duration of Powers*," some limit may, if necessary, be placed upon the powers of the engineer, while, on the other hand, it is not unimportant to provide that if a contract is determined by one party or the other, the powers of the engineer as to ascertaining the amount due to the contractor shall still be in force and be a condition precedent to any claim by the latter.

The clauses under the heading "*Reservations*" (a) (b) (c) contain merely express provisions which are implied in law, and therefore might be omitted. Of the other two clauses (c) is only intended to clearly define the act or

acts which shall alone terminate the risks of the contractor, while clause (d) expresses the extent of the employer's liability.

The clauses under the heading "*Formalities*" should be included in every contract. The clause as to a resolution of a corporation being the recognised act by which the corporation is to be bound, may be necessary where powers, perhaps improperly defined, are deputed to committees.

Under the heading "*Disputes*" there are in effect two main clauses. One provides that the decision of the engineer shall be final, and that he shall not be an arbitrator. The other provides either that the engineer or some other person shall be arbitrator in case of disputes, or only arbitrator in disputes not coming within the powers of the engineer under the first clause. The one clause may be called for convenience a dispute-prevention clause, and the other a dispute-settling or arbitration clause.

The dispute-prevention clause is a clause which gives the engineer power to finally decide everything, without being arbitrator, as a condition precedent to any claim by the contractor. In this case the engineer's decision cannot be reviewed by the Courts, unless he has acted dishonestly or in collusion with his employer; but in the case of an arbitration clause, the engineer or the person named as arbitrator is subject to all the provisions of the Arbitration Act, 1889, and his decision may be set aside for just cause in the same way as the decisions of any other arbitrator. But where the arbitrator is the engineer or architect of the works, he may to some extent decide upon facts from his personal knowledge, and in that respect he differs from an ordinary arbitrator.

In addition to all the above clauses, various special clauses are inserted to meet the particular requirements of the work proposed to be carried out, and in particular reference should be made to any special Acts of Parliament, and their provisions incorporated as far as may be necessary.

This completes an outline description of the special features of building and engineering contracts.

The principles of law applicable to these, as well as to all other contracts, will be found in any of the well-known legal texts-books. [See Hudson on *Building Contracts*, 2nd ed.; Emden on *Building Contracts*, 2nd ed.]

**Building Estate.**—See VENDOR AND PURCHASER.

**Building Lease.**—See LEASE.

**Building Line.**—See LONDON (COUNTY).

**Building Scheme.**—See GENERAL BUILDING SCHEME.

**Building Societies.**—A building society is a society for the purpose of raising, by the subscriptions of the members, a stock or fund for the purpose of making advances to members out of the funds of the society upon real or leasehold estate by way of mortgage (B. S. Act, 1874, s. 13). The members are of two classes: unadvanced or investing members, who merely pay their subscriptions to the society; and advanced or borrowing members, who borrow money from the society on mortgage. There are two kinds of

societies: (1) Terminating; (2) Permanent. A terminating society is one which is to terminate at a fixed date, or when a result specified in its rules is attained (B. S. Act, 1874, s. 5). In most terminating societies a fixed subscription is made payable by the members so long as the society lasts, the object being to continue the society until the subscriptions, with the interest that has arisen from their investment, produce such an amount as may have been fixed by the rules. As soon as there are sufficient funds in hand, advances are made to members in anticipation of what would be payable to them on the termination of the society, the member who receives the advance giving a mortgage to secure the continued payment of the subscriptions due from him to the society; and when each member has received the amount of the share or shares for which he subscribed, the society terminates. A permanent society, on the other hand, is one which has no fixed date or specified result at which it is to terminate (B. S. Act, 1874, s. 5), and may therefore continue its operations for an indefinite time. In a permanent society the members take shares of a certain fixed amount, on which payment has to be made, either in a lump sum or by instalments, until the share is paid up in full, and the sums so paid generally carry interest. Advances are made from time to time on mortgage of real or leasehold property, the money advanced being usually repayable by instalments, composed partly of principal and partly of interest. Building societies, whether terminating or permanent, are either incorporated or unincorporated.

*INCORPORATED SOCIETIES.*—Incorporated societies are societies which were either formed in the first instance under the B. S. Act, 1874, or having been originally formed under the B. S. Act of 1836 (6 & 7 Will. IV. c. 32) have since obtained a certificate of incorporation under the Act of 1874. They are governed by the B. S. Acts, 1874 to 1894, and the B. S. Regulations, 1895, framed by the Secretary of State under sec. 44 of the Act of 1874.

The B. S. Acts, 1874 to 1894, apply to Scotland and Ireland, but not to the Channel Islands or the Isle of Man. In what follows it must be understood that incorporated societies (which are the more important class) are alone referred to. As to unincorporated societies, see *post*, p. 299.

The rules of the society must set forth the name and chief office of the society; the manner in which its funds are to be raised; the terms upon which unadvanced subscription shares are to be issued; the manner in which the contributions are to be paid and withdrawn, with tables, where applicable, showing the amount due by the society for principal and interest separately; the terms upon which paid-up shares, if any, are to be issued and withdrawn, with tables, where applicable, showing the amount due by the society for principal and interest separately; whether preferential shares are to be issued, and, if so, within what limits; the manner in which advances are to be made, not being by ballot or dependent on any chance or lot, and not being on second mortgage, and repaid; the deductions, if any, for premiums, and the conditions upon which a borrower can redeem the amount due from him before the expiration of the period for which the advance was made, with tables, where applicable, showing the amount due from the borrower after each stipulated payment; the manner in which losses are to be ascertained and provided for; the manner in which membership is to cease; whether the society intends to borrow money, and, if so, within what limits not exceeding those prescribed by the Act, and not including mortgages twelve months in arrear, or properties twelve months in possession, nor allowing of deposits except upon condition of one month's notice; how the funds of the society are to be applied and invested;

the manner of altering the rules of the society, and of making additional rules; the manner of appointing, remunerating, and removing the officers; the manner of calling general and special meetings of the members; provision for an annual or more frequent audit of the accounts, and inspection by the auditors of the mortgages and other securities belonging to the society; whether disputes between the society and its members are to be settled by reference to the County Court, or to the registrar, or to arbitration; provision for the device, custody, and use of the seal of the society, and for the custody of the mortgage deeds and other securities belonging to the society; the powers and duties of the officers; the fines and forfeitures to be imposed on members; and the manner in which the society is to be terminated or dissolved, and whether it is terminating or permanent (B. S. Act, 1874, s. 16; B. S. Act, 1894, ss. 1, 28; Regulations, r. 2).

Where the registrar is satisfied that a certificate of incorporation has been obtained for a building society by fraud or mistake, or that any society exists for an illegal purpose, or has wilfully and after notice from him violated any of the provisions of the Building Societies Acts, or has ceased to exist, he may, with the approval of the Secretary of State, cancel the registry of the society, or suspend its registry, for any term not exceeding three months, and may, with the like approval, renew such suspension from time to time for the like period. The registrar must, however, before so cancelling or suspending the registry of a society, give the society not less than two months' previous notice in writing, specifying the ground of the proposed cancelling or suspension, and he must also advertise the cancellation or suspension in the *Gazette* and in some local newspaper (B. S. Act, 1894, s. 6). The society may appeal from the cancellation, or from any suspension for a term exceeding six months, to the High Court or the Court of Session (*ibid.*).

The registrar may also, if he thinks fit, at the request of the society, cancel its registry (*ibid.*).

A society whose registry has been cancelled or suspended ceases to enjoy the privileges of a society under the Building Societies Acts, but without prejudice to any liability actually incurred by the society, and any such liability may be enforced against the society as if the cancelling or suspension had not taken place (*ibid.*).

The Court has no power to declare a certificate of incorporation void on the ground that it was irregularly obtained (*Glover v. Giles*, 1881, 18 Ch. D. 173).

Any certificate of incorporation or registration or other document relating to a society purporting to be signed by the registrar, will, in the absence of any evidence to the contrary, be received by all Courts and elsewhere without proof of the signature; and a printed copy of the registered rules, certified by the secretary or other officer to be a true copy, in the absence of evidence to the contrary, is received as evidence of the rules (B. S. Act, 1874, s. 20).

The certificate of the registrar, though not conclusive as to the legality of a rule (*Laing v. Reed*, 1869, 21 L. T. 83; L. R. 5 Ch. 4), is conclusive as to the regularity of the proceedings by means of which the rule was passed (*Dewhurst v. Clarkson*, 1854, 3 El. & Bl. 194; *Rosenberg v. Northumberland Building Society*, 1889, 22 Q. B. D. 373). The remedy against the registrar for improperly refusing to register a rule is by *mandamus* (*q.v.*).

The rules for the time being form the contract between the society and its members, and it can only be varied by an alteration of the rules duly registered, and in no other way; thus an attempt to alter the

contract by the resolution of a general meeting will be ineffectual (*Auld v. Glasgow Working Men's Building Society*, 1887, 12 App. Cas. 197; 14 Rettie, 27).

A building society may, so far as necessary for its proper purposes, hold land with the right of foreclosure, and may also from time to time raise funds by the issue of shares of one or more denominations, either paid up in full or to be paid by periodical or other subscriptions, and with or without accumulating interest, and may repay such funds when no longer required for the purposes of the society. Any land, however, to which it may become absolutely entitled by foreclosure, or by surrender, or other extinguishment of the right of redemption, must, as soon afterwards as may be conveniently practicable, be sold or converted into money (B. S. Act, 1874, s. 13). A society may not advance money on mortgage of property other than land (*Cullerne v. London and Suburban Building Society*, 1890, 25 Q. B. D. 485), nor (in England) make advances on second mortgage unless the society itself is the first mortgagee (B. S. Act, 1894, s. 13), nor cause or permit applicants for advances to ballot for precedence, or in any way make the granting of an advance depend on any chance or lot (*ibid.* s. 12), unless the society was established prior to 25th August 1894 and its rules permit such balloting, in which case special provision is made for altering the rules in this respect (*ibid.*).

Every building society enjoys the following statutory powers and privileges:—It may purchase, build, hire, or take upon lease any building for conducting its business, and may adapt and furnish the same, and may purchase or hold upon lease any land for the purpose only of erecting thereon a building for conducting the business of the society, and may sell, exchange, or let such building, or any part thereof (B. S. Act, 1874, s. 37); it may change its chief office (B. S. Act, 1877, s. 2), change its name (B. S. Act, 1874, s. 22), alter its rules (*ibid.* s. 18), invest any portion of its funds not immediately required for its purposes in any of the securities authorised by sec. 25 of the B. S. Act, 1874, or in any security for the time being authorised by law for the investment of trust funds (B. S. Act, 1894, s. 17), and make deposits and investments through savings banks (*ibid.* s. 16); and when trustees, who hold stock in trust for a society, are abroad, dead, or incapacitated, a transfer of the stock may be directed by the registrar (B. S. Act, 1874, s. 26). Two societies may also unite and become one society, or one society may transfer its engagements to another (B. S. Act, 1874, s. 33; B. S. Act, 1894, s. 19; B. S. Act, 1877, s. 5; Regulations, rr. 30, 31).

The society may receive deposits or loans from any person or corporation, or from any terminating building society, but in a *permanent* society the amount so received must not at any time exceed two-thirds of the amount for the time being secured to the society by mortgages from its members, and in a *terminating* society the amount may be either a sum not exceeding such two-thirds, or a sum not exceeding twelve months' subscriptions on the shares for the time being in force (B. S. Act, 1874, s. 15; and see *Looker v. Wrigley*, 1882, 9 Q. B. D. 397). Every deposit book, or acknowledgment, or security given for a deposit or loan must have written or printed on it the whole of secs. 14 and 15 of the B. S. Act, 1874 (*ibid.*), but this provision is directory only, and failure to comply with it will not invalidate the security (*In re Guardian Building Society*, 1882, 23 Ch. D. 440). In calculating the extent of the society's borrowing powers, however, mortgages twelve months in arrear at the date of the society's last annual account, and mortgages on properties of which the society has been twelve

months in possession at the date of such account, are to be excluded (B. S. Act, 1894, s. 14); and the society is further forbidden to accept any deposit, except on the terms that not less than one month's notice may be required by the society before repayment (*ibid.* s. 15). If the society receives deposits or loans in excess of the prescribed limits, the directors or committee of management will be personally liable for the excess (B. S. Act, 1874, s. 43; *Cross v. Fisher* [1892], 1 Q. B. 467).

Once a year at least, the society must make out a proper account and balance-sheet, which must be in the form and contain the particulars prescribed by the registrar. The account must be properly attested and the society's mortgages inspected by auditors, one of whom must be a person who publicly carries on the business of an accountant, and one copy of the account must be sent to every member and creditor, another must be suspended in the office of the society, and a third sent to the registrar within a limited time (B. S. Act, 1874, s. 40; B. S. Act, 1894, ss. 2, 3).

The rules and all documents and instruments issued, given, or made by a building society under its rules or under the Building Societies Acts are exempt from stamp duty, but this exemption does not extend to mortgages, which must therefore be stamped in the ordinary way (B. S. Act, 1874, s. 41).

The following are statutory offences in the case of a building society:—

1. Commencing business without first obtaining a certificate of incorporation (B. S. Act, 1874, s. 43).

2. Making default in inserting in any deposit book or security for loan the matters required by sec. 15 of the Act of 1874 (*ibid.*).

3. Accepting any deposit except on the terms allowed by sec. 15 of the Act of 1894 (B. S. Act, 1894, s. 15).

4. Using any name or title other than the registered name of the society (B. S. Act, 1894, s. 15).

5. Neglecting or refusing (*a*) to give any notice, send any return or document, or do or allow to be done anything which the society is by the Building Societies Acts required to give, send, do, or allow to be done; or (*b*) to do any act or furnish any information required for the purposes of those Acts by the registrar or an inspector (*ibid.* s. 21).

Where a society has, for two months after notice, failed to make any return, or to correct or complete any return, the registrar may, with the consent of the Secretary of State, call a special meeting of the society, or appoint an inspector to examine into the state of its affairs (B. S. Act, 1894, s. 5, subs. 2).

The usual officers of a building society are a board of directors or committee of management, a secretary or manager, and auditors; and it is usual also to appoint a solicitor and a surveyor.

Every officer having the receipt or charge of money must give a bond or other security for rendering a just and true account of all moneys received and paid by him on account of the society, and for payment of all sums due from him to the society (B. S. Act, 1874, s. 23).

Every officer must, upon demand, (*a*) give in his account as may be required by the directors or committee of management to be examined and allowed or disallowed by them; (*b*) pay over all the moneys remaining in his hands; (*c*) deliver all property of the society in his hands or custody to such person as the society appoint; and in case of his neglect or refusal, the society may sue upon the bond, or may apply to the County Court, who may proceed thereupon in a summary way, and make such order

thereon as to the Court shall seem just, which order will be final (B. S. Act, 1874, s. 24).

If any person by false representation or imposition (*a*) obtains possession of any moneys or effects of the society, or (*b*) having the same in his possession, withholds or misapplies the same, he will be liable to a penalty not exceeding twenty pounds and costs, and to be ordered to deliver up to the society such moneys or effects, and to repay the money applied improperly, and in default to be imprisoned for any time not exceeding three months; but nothing contained in this provision will prevent any such person from being proceeded against by way of indictment if a conviction has not been previously obtained against him for the same offence under the provisions of the Act (B. S. Act, 1874, s. 31; *Vernon v. Watson* [1891], 2 Q. B. 288).

Proceedings under the above provisions may be taken by (*a*) the society; or (*b*) any member authorised by the society, or by the directors or committee of management, or by the registrar; or (*c*) the registrar (B. S. Act, 1894, s. 18).

No director, secretary, surveyor, solicitor, or other officer may receive from any other person any gift, bonus, commission, or benefit, for, or in connection with any loan made by the society; and any person *paying or accepting* any such gift, etc., will be liable on summary conviction to a fine not exceeding fifty pounds, and, in default of payment, to be imprisoned for any time not exceeding six months, and the person *accepting* any such gift, etc., must, as and when directed by the Court by whom he is convicted, pay to the society the amount or value of such gift, etc., and in default will be liable to be imprisoned for any time not exceeding six months (B. S. Act, 1894, s. 23).

If any person wilfully makes, orders, or allows to be made any false statement in any document required by the Building Societies Acts to be sent to the registrar, or wilfully falsifies any such document, he will be liable on summary conviction to a fine not exceeding fifty pounds (*ibid.* s. 22).

Upon the hearing of any charge involving the infliction of fine or imprisonment on summary conviction under the Building Societies Act, 1894, the defendant and his wife are admissible as competent witnesses (B. S. Act, 1894, s. 24).

All officers of the society are liable to be examined on oath touching the society's affairs by any inspector appointed by the registrar (*ibid.* s. 5), and the officials who are in fault will be personally liable for any statutory offence committed by the society (see *ante*, p. 293). If money is advanced on second mortgage (except when the society itself is first mortgagee), the directors who authorised the advance will be liable for any loss thereby occasioned to the society (B. S. Act, 1894, s. 13).

The directors of a building society are not, properly speaking, trustees, but they will nevertheless be treated as such in respect of money of the society which has come to their hands, or is actually under their control (*Sheffield and South Yorkshire Building Society v. Aislewood*, 1889, 44 Ch. D. 412); consequently, whenever they are liable to be dealt with on the footing of trustees they can now plead the Statute of Limitations (*In re Lands Allotment Co.* [1894], 1 Ch. 616).

A building society, unlike a joint stock company, has no fixed capital, but shares are issued from time to time, as persons are found willing to take them up. The shares may be paid up either at once or by instalments, according to the rules, which may also provide for the issue of preferential shares (B. S. Act, 1894, s. 1). An infant may be a member, in the absence of any rule to the contrary, and may give all necessary acquittances, but

cannot vote or hold office (B. S. Act, 1874, s. 38). Two or more persons may jointly hold a share (*ibid.* s. 39), and a society registered under the Industrial and Provident Societies Act, 1893, may also be a shareholder (56 & 57 Vict. c. 39, s. 38).

The liability of a member in respect of any share on which no advance has been made is limited to the amount actually paid or in arrear on such share, and in respect of any share on which an advance has been made is limited to the amount payable thereon under any mortgage or other security, or under the rules of the society (B. S. Act, 1874, s. 14; and see *Brownlie v. Russell*, 1883, 8 App. Cas. 235; 10 *Rettie* (H. L.), 19).

On the application of ten members, each of whom has been a member of the society for not less than twelve months, the registrar may appoint an accountant or actuary to inspect and report on the books of the society. The applicants must give security for the costs, and the expenses of the inspection will be defrayed by the applicants, or out of the funds of the society, or by the members or officers, or former members or officers, in such proportions as the registrar may direct (B. S. Act, 1894, s. 4).

The person appointed will have power to make copies of and extracts from the books of the society, and the registrar will communicate the results of the inspection to the applicants and to the society (*ibid.*).

On the application of one-tenth of the members, or of one hundred members in the case of a society consisting of more than one thousand members, the registrar, with the consent of the Secretary of State, may either (1) appoint an inspector to examine into and report on the society's affairs, or (2) call a special meeting of the society (*ibid.* s. 5).

The application must be supported by such evidence as the registrar may direct for the purpose of showing that the applicants have good reason for requiring the inspection or the meeting, and that they are not actuated by malicious motives; and notice of the application must be given to the society. The applicants must also give security for the costs, and the expenses of the inspection or meeting will be defrayed by the applicants, or out of the funds of the society, or by the members or officers, or former members or officers, in such proportions as the registrar may direct. The inspector may require the production of the books, accounts, securities, and documents of the society, and may examine on oath its officers, members, agents, and servants in relation to its business. And the registrar may prescribe the time and place of the meeting, and the matters to be discussed and determined, and the meeting will have all the powers of a meeting called according to the rules of the society, and will also have power to appoint its own chairman (*ibid.*).

Where evidence is furnished, by a statutory declaration of not less than three members, of facts which, in the opinion of the registrar, call for investigation, or for recourse to the judgment of a meeting, the registrar may exercise the above powers without any application by members, but with the consent of the Secretary of State; but the registrar is bound, on receipt of such declaration, to send a copy thereof to the society, and the society will, within fourteen days, be entitled to give him an explanatory statement in writing by way of reply thereto (*ibid.*).

On the death intestate of a member or depositor, the amount due to him, not exceeding £50, may be paid to the person who appears to the directors to be entitled under the Statute of Distributions without taking out letters of administration, on the society receiving satisfactory evidence of the death, and a statutory declaration that the deceased died intestate, and that the claimant is entitled; any such payment will be good against the next of kin



or representative of the deceased, but they will have their remedy against the payee (B. S. Act, 1874, s. 29). On the death intestate of an advanced member leaving an infant heir, the society, after selling the mortgaged property may pay the surplus proceeds of sale, not exceeding £150, to the administrator of the deceased, and such sum will be considered personal estate and liable to duty accordingly (*ibid.* s. 30).

An investing member may at any time withdraw from the society, on such terms as are prescribed by the rules, which generally require a certain length of notice to be given on withdrawal. On a member who has given notice of withdrawal being repaid his subscriptions, his connection with the society is at an end (*In re Sheffield and South Yorkshire Building Society*, 1889, 22 Q. B. D. 472); but a member who has given notice, but has not yet been repaid, though he ceases to be liable for any further subscriptions (*Sibun v. Pearce*, 1890, 44 Ch. D. p. 372), and may be entitled to priority of payment out of the assets of the society (*Walton v. Edge*, 1884, 10 App. Cas. 33), still remains a member in other respects. Thus, he will be bound by a rule referring disputes between the society and its members to arbitration (*Walker v. General Mutual Building Society*, 1887, 36 Ch. D. 777), his vote must be taken into account in ascertaining the statutory majority required to sign an instrument of dissolution (*Sibun v. Pearce*), and he will be bound by alterations of rules, though made subsequently to the expiration of his notice of withdrawal (*Pepe v. City and Suburban Building Society* [1893], 2 Ch. 311; *Barnard v. Tomson* [1894], 1 Ch. 374); and if, while the notice is running, the society is dissolved or ordered to be wound up (*Selkirk v. Taylor*, 24 Sc. L. R. 600; *S. C. nom. North British Building Society v. McLellan*, 14 Rettie, 827), or even if there is a stoppage of the society's business, or a recognition by those entitled to form a judgment that it must be stopped (*In re Ambition Investment Society* [1896], 1 Ch. 89; *In re Sunderland Building Society*, 1890, 24 Q. B. D. 394), the notice becomes of no effect, and no priority can be acquired under it in the distribution of the society's assets.

Though the rights of an advanced member are to some extent affected by the contract of membership as well as by the contract of mortgage (*Rosenberg v. Northumberland Building Society*, 1889, 22 Q. B. D. 380), still, speaking generally, the ordinary law of mortgage applies in the case of a security given to a building society by one of its members (*Provident Building Society v. Greenhill*, 1878, 9 Ch. D. 122), and the society has the right of foreclosure (*Provident Building Society v. Greenhill*; B. S. Act, 1874, s. 13), and the advanced member the right of redemption on such terms as are prescribed by the rules. As to redemption in a terminating society, see *Seagrave v. Pope*, 1852, 1 De G. M. & G. 783; *Fleming v. Self*, 1849, 1 H. & T. 301; 3 De G. M. & G. 1032, n.; Seton, vol. ii. p. 1762, 5th ed.; and as to the amount the society is entitled to retain on a sale of the mortgaged premises, see *Matterson v. Elderfield*, 1869, L. R. 4 Ch. 207; *Ex parte Osborne*, *In re Goldsmith*, 1874, L. R. 10 Ch. 41; 31 L. T. 366. An advanced member will be bound by any alteration of the rules, though made subsequently to the date of his advance (*Rosenberg v. Northumberland Society*; *Bradbury v. Wild* [1893], 1 Ch. 377); in the absence of special contract, however, he is not liable to bear a share of any losses sustained by the society (see *post*, p. 298). In taking the accounts in a foreclosure or redemption action, fines will be treated as principal and will carry interest accordingly if there is an agreement to that effect (*Provident Building Society v. Greenhill*). Advanced members are entitled to deduct income tax from so much of their repayments as represents interest (*Ex parte Wythes*, 1885, 53 L. T. 492; *Galashiels Provident Building Society v.*

*Newlands*, 1893, 20 Rettie, 821; *W. N.* (1896), 107); but the premium commonly charged for an advance is not in the nature of interest, although it may be payable by instalments (*Ex parte Bath, In re Phillips*, 1884, 27 Ch. D. 509).

On payment of all moneys secured by the mortgage, the society may endorse upon or annex to the security either a reconveyance or a receipt, in a prescribed form under the seal of the society, countersigned by the secretary or manager (B. S. Act, 1874, s. 42). Such a receipt will vacate the security, and vest the legal estate in the person who has in equity the best right to call for a conveyance of it (*ibid.*; *Fourth City Mutual Society v. Williams*, 1879, 14 Ch. D. 140; *Hosking v. Smith*, 1888, 13 App. Cas. 582); and it will effectually prevent the society from afterwards asserting that anything remains due on the mortgage, even though the receipt was given under a mistake (*Harvey v. Municipal Permanent Investment Building Society*, 1884, 26 Ch. D. 273; *London and County United Building Society v. Angell*, [1896], 65 L. J. Q. B. 194).

Disputes between a building society and its members may be settled by reference (1) to arbitration, or (2) to the registrar, or (3) to the County Court; and the rules must state which mode is to be followed. The term "disputes" is, however, confined to disputes between the society and a member or any representative of a member in his capacity of a member of the society, unless otherwise expressly provided by the rules; and in the absence of such express provision will not apply to a dispute as to the construction or effect of any mortgage deed or any contract contained in any document other than the rules of the society (B. S. Act, 1884, s. 2; *Western Suburban and Notting Hill Permanent Benefit Building Society v. Martin*, 1886, 17 Q. B. D. 66, 609). Consequently any dispute with an advanced member must be settled by recourse to the ordinary tribunals.

Where the rules direct disputes to be referred to arbitration, arbitrators must be elected in manner provided by the rules, or if there is no such provision, at the first general meeting of the society, none of the arbitrators being beneficially interested in the society's funds; and not less than three out of the arbitrators so elected are to be chosen by ballot in each case of dispute, the number and mode of ballot being determined by the rules (B. S. Act, 1874, s. 34; *Norton v. Counties Conservative Permanent Benefit Building Society*, 1894, 71 L. T. 790). The award should limit a time within which it is to be performed, and may be enforced by the County Court (s. 34).

The registrar determines disputes—

1. Whenever the rules direct them to be referred to him:
2. Whenever the parties to a dispute agree to refer it to him (*ibid.*): and his award has the same effect as that of arbitrators.

The County Court determines disputes—

1. Whenever the rules direct them to be referred either to the Court or to justices:
2. Whenever either party has for forty days after application neglected to go to arbitration, or the arbitrators have refused, or for twenty-one days neglected, to make any award (s. 35).

The determination of a dispute, whether by arbitrators, the registrar, or the County Court, is final, and is not subject to appeal (s. 36); but either the arbitrators, the registrar, or the County Court may at the request of either party state a case for the opinion of the Supreme Court on any question of law (*ibid.*; B. S. Act, 1894, s. 20), and may grant discovery as to documents and otherwise (B. S. Act, 1874, s. 36).

A building society may terminate on the happening of any event

declared by its rules to be the termination of the society (B. S. Act, 1874, s. 32). It may be dissolved—

1. In manner prescribed by the rules (*ibid.*).

2. With the consent of three-fourths of the members holding not less than two-thirds of the shares testified by their signatures to an instrument of dissolution, which must be duly registered (*ibid.*; *Dennison v. Jeffs* [1896], 1 Ch. 611; *Sibun v. Pearce*, 1890, 44 Ch. D. 354). Such an instrument cannot cancel priorities previously acquired by notices of withdrawal (*Botten v. City and Suburban Permanent Building Society* [1895], 2 Ch. 441).

When a society is being dissolved in either of the above modes, the provisions of the Building Societies Acts continue to apply in the case of the society as if the persons conducting the dissolution or the trustees under the instrument of dissolution were the directors or committee of management of the society (B. S. Act, 1894, s. 9), and such persons or trustees must within twenty-eight days from the termination of the dissolution send to the registrar an account and balance-sheet showing the assets and liabilities of the society, and the manner in which they have been applied and discharged (*ibid.* s. 11).

3. By award of the registrar, on the written application of one-tenth of the members, or of one hundred members in the case of a society of more than one thousand members, setting forth that the society is unable to meet the claims of its members, and that it would be for their benefit that it should be dissolved (B. S. Act, 1894, s. 7).

4. By winding up, either voluntarily under the supervision of the Court or by the Court, if the Court shall so order, on the petition of any member authorised by three-fourths of the members present at a general meeting specially called for the purpose to present the same on behalf of the society, or on the petition of any judgment creditor for not less than £50, but not otherwise (B. S. Act, 1874, s. 32 (4)). The winding-up provisions of the Companies Acts, 1862 and 1867, apply in every case (*Jones v. Swansea Cambrian Society*, 1880, 29 W. R. 382; County Court Rules, 1889, Ord. xl. r. 9), but the *forum* depends upon the amount of the society's assets. If the amount standing to the credit of the holders of unadvanced shares exceeds ten thousand pounds, the petition must be presented to the High (or Palatine) Court; if the amount does not exceed ten thousand pounds, and the chief office is situate within the jurisdiction of a County Court having jurisdiction under the Winding-up Act, 1890, the petition must be presented to that County Court (B. S. Act, 1894, s. 8; Companies (Winding-up) Act, 1890, s. 1, subss. 1, 2, 3, 5, 6; Ord. of Nov. 29, 1890; W. N. (1890), 577; *In re The Court Bureau* (No. 2), W. N. (1891), 15; *In re Real Estates Co.* [1893], 1 Ch. 398).

Advanced members cannot in a dissolution or winding up be required to pay up the amounts remaining owing by them except at the times and in the manner expressed in their securities (B. S. Act, 1894, s. 10). They may redeem, without regard to any losses the society has sustained (*Brownlie v. Russell*, 1883, 8 App. Cas. 235; 10 *Rettie* (H. L.), 19; *Tosh v. North British Building Society*, 1886, 11 App. Cas. 490), unless there is a special contract making them liable to share losses (*In re West Riding Building Society*, 1890, 43 Ch. D. 407). Investing members are only liable to contribute to the assets to the extent (if any) to which their subscriptions are in arrear at the commencement of the dissolution or winding up (B. S. Act, 1874, s. 14; *Brownlie v. Russell*); and any members who gave notices to withdraw which expired while the society was still a going concern, or whose shares are

realised, will not be deprived by the winding up of any priority to which they may be entitled under the rules (*Walton v. Edge*, 1884, 10 App. Cas. 33; *Ex parte Rackham*, 1876, 45 L. J. Ch. 785), provided of course that they do not compete with outside creditors. Any surplus assets remaining after payment of debts and making provision for priorities of withdrawn and realised shares will be divided among the members according to their rights at the commencement of the winding up (*In re Middlesbrough Building Society*, 1889, 58 L. J. Ch. 771).

**UNINCORPORATED SOCIETIES.**—Unincorporated building societies are governed by the Building Societies Act of 1836 (6 & 7 Will. iv. c. 32), and the two old Friendly Societies Acts of 1829 (10 Geo. iv. c. 56) and 1834 (4 & 5 Will. iv. c. 40) incorporated therewith, which, though repealed for all other purposes, are still in force so far as relates to building societies certified prior to the year 1856, and not incorporated under the Building Societies Act of 1874 (B. S. Act, 1874, s. 7 (part of which section is itself repealed); B. S. Act, 1894, s. 25 (2)). Unincorporated societies with a few exceptions are an unimportant class, and no new society can now be established on this footing. Apart from statutory provisions and requirements, what has been said above as to incorporated societies applies also, generally speaking, to unincorporated societies. The statutory provisions applicable to the latter are as follows:—

The purposes of the society are those defined by sec. 1 of the Act of 1836; the shares must not exceed £150 in value, and no profits are payable until the share is realised or withdrawn (6 & 7 Will. iv. c. 32, s. 1). The property of the society vests in its trustees for the time being, without conveyance or assignment, except in the case of public stocks and funds, and the society sues and is sued in the name of the trustees (10 Geo. iv. c. 56, s. 21). The society can alter its rules (*ibid.* ss. 5, 9; 4 & 5 Will. iv. c. 40, s. 4), alter its place of meeting (10 Geo. iv. c. 56, s. 10), and invest its surplus funds on certain specified securities, or in the purchase of land (*ibid.* s. 13). It is under the same obligation to make an annual statement of accounts, and the society, its officers and members, are liable to the same penalties for default in so doing as in the case of an incorporated society (B. S. Act, 1874, s. 40; B. S. Act, 1894, s. 25 (1)). All instruments and documents issued or made by the society in the course of its business are exempt from stamp duty (10 Geo. iv. c. 56, s. 37; 6 & 7 Will. iv. c. 32, s. 8), but, in the case of mortgages, this exemption is limited to mortgages by members for not exceeding £500 (Stamp Act, 1891, s. 89). The society may borrow money if and so far as authorised by its rules (*Murray v. Scott*, 1884, 9 App. Cas. 519), either expressly or by implication (*Cunliffe, Brooks, & Co. v. Blackburn Benefit Building Society*, 1884, 9 App. Cas. p. 865), and if money has been borrowed in excess of the society's powers, the lender may in some cases recover the amount lent, under the equitable doctrine of subrogation (*Blackburn Benefit Building Society v. Cunliffe, Brooks, & Co.*, 1882, 22 Ch. D. 61; 1884, 9 App. Cas. 857; *Baroness Wenlock v. River Dee Co.*, 1887, 19 Q. B. D. 155), or from the directors personally on the ground of breach of warranty (*Richardson v. Williamson*, 1871, L. R. 6 Q. B. 276; *Chapleo v. Brunswick Building Society*, 1881, 6 Q. B. D. 696). The officers of the society are bound by its rules, of which they are deemed to have full notice (10 Geo. iv. c. 56, s. 8), and any who have to receive or expend moneys of the society are bound, if the rules so require, to give a bond with two sureties as security for the due discharge of their duties (*ibid.* s. 11). Provision is also made for compelling officers to account (*ibid.* s. 13), and for the punishment of fraud on the part of officers, members, and others, in relation to the affairs of the society (*ibid.* s. 25); and in cer-

tain cases the society is entitled to priority of payment out of the assets of its officers (4 & 5 Will. iv. c. 40, s. 12; *In re Williams, Jones v. Williams*, 1887, 36 Ch. D. 573; *Moors v. Marriott*, 1878, 7 Ch. D. 543; *In re Miller* [1893], 1 Q. B. 327; *In re Welch*, 1894, 70 L. T. 691). Fines may be imposed on the members, but the amount of the fine must be "reasonable" (6 & 7 Will. iv. c. 32, s. 1; *Lovejoy v. Mulhern*, 1877, 37 L. T. 77); whether an infant can be a member seems doubtful. Payment on the death of a member to the person apparently entitled will be valid (10 Geo. iv. c. 56, s. 23), and payment of a sum not exceeding £20 may be made without letters of administration on the death of a member intestate (*ibid.* s. 24). Every member is entitled to receive from the society a copy of its annual account and statement (B. S. Act, 1894, s. 25; B. S. Act, 1874, s. 40); and on repayment of an advance, the society reconveys by endorsed receipt (6 & 7 Will. iv. c. 32, s. 5; and see *Hosking v. Smith* and the other cases cited above). As to disputes, the rules must state whether they are to be referred to arbitrators or to the justices of the peace for the county where the society was formed (10 Geo. iv. c. 56, s. 27). In the former case arbitrators must be appointed in the manner pointed out by the Act (*ibid.*); and their award will be final, and may be enforced by two justices (*ibid.*), who may also determine a dispute if the society refuse to arbitrate or the arbitrators fail to make an award (4 & 5 Will. iv. c. 40, s. 7). If the rules direct a reference to justices, any two of them may determine the matter (10 Geo. iv. c. 56, s. 28), and their decision will be final (*ibid.* s. 29). A dispute between the society and an advanced member is not within the above provisions, and must be settled by action in the usual way (*Mulkern v. Lord*, 1879, 4 App. Cas. 182).

The society may come to an end in two ways:—(1) It may be dissolved in manner prescribed by its rules; (2) it may be wound up compulsorily under the Companies Act, 1862, as an unregistered company (*In re No. 3 Midland Counties Benefit Building Society*, 1864, 4 De G. J. & S. 468; Companies Act, 1862, ss. 199–204), but no valid winding-up order can be made if the number of members is below seven (*In re Bowling & Welby's Contract* [1895], 1 Ch. 663). The Court to which the petition should be presented depends on the amount paid up on the unadvanced shares (see *ante*, p. 298), and the general principles there stated will apply, except that advanced members can be compelled to pay up their balances at once (*Tosh v. North British Building Society*, 1886, 11 App. Cas. 489), and that there is no statutory limit as to the liability of the members; as to the extent of their liability, see *In re West London and General Permanent Benefit Building Society* [1894], 2 Ch. 352. See Wurtzburg on *Building Societies*, 3rd ed.; Macoun on *Building Societies*.

**Buildings.**—See PUBLIC HEALTH; as to Firing, etc., see ARSON; and as to Injuring, see EXPLOSIVE; MALICIOUS DAMAGE; RIOT.

**Bull.**—See PAPAL BULL; STOCK EXCHANGE.

**Bull-baiting.**—See ANIMALS.

**Buoy.**—See LIGHTHOUSES.

**Burden of Proof.**—The necessity which lies, now on one party, now on the other, of calling evidence, to prevent judgment going against him. The *onus* frequently shifts as the case proceeds from the person on whom it rested at first to his opponent. Thus, in an action for the recovery of land, the defendant is in possession, and it is presumed in his favour that he is rightly in possession; therefore the plaintiff must begin. But as soon as the plaintiff proves that he is the heir-at-law of A., who was in possession of the land at the time of his death last year, the burden of proof is shifted. It is now for the defendant to produce A.'s will, and show a devise to himself. That is a *prima facie* answer to the plaintiff's case; and the *onus* once more lies on him. The plaintiff must give some additional evidence, e.g., to show that A. was not of sound mind when he executed that will, or that he revoked it by a subsequent codicil. So in a prosecution for larceny, the prisoner is presumed to be innocent till he is proved guilty. But as soon as the prosecution has proved that the prisoner was found in possession of the stolen goods the day after they were stolen, the burden of proof shifts, and it is for the prisoner to satisfy the jury that he came by them honestly.

1. *The Right to Begin.*—In a civil case this depends entirely on the pleadings. The defendant may have made admissions in his defence which entitle him to begin. This may have been done purposely: as it is generally an advantage to have the first word with the jury; and if the plaintiff gives no evidence in answer to the defendant's case, the defendant will have the last word too. But the defendant may not make admissions in Court when the case is called on, which are not on the pleadings, so as to obtain the right to begin (*Price v. Seaward*, 1841, Car. & M. 23), unless indeed he can persuade the judge to amend the pleadings then and there.

If the defendant has in his defence traversed any material allegation which is essential to the plaintiff's case, the plaintiff has the right to begin. If one issue be on him, it does not matter that there are others which lie on the defendant. If both parties claim the right to begin, the judge will decide between them, according to the pleadings as they stand. The test always is, For which party must judgment be entered, supposing no evidence be given on either side? The other party has the right to begin. The plaintiff has this further advantage, that whenever he claims unliquidated damages he is entitled to begin, unless the defendant has admitted that the plaintiff is *prima facie* entitled to recover the full sum which he claims (*Carter v. Jones*, 1833, 6 Car. & P. 64; 1 Moo. & R. 281; *Mercer v. Whall*, 1845, 5 Q. B. 447, 462, 463; 14 L. J. Q. B. 267, 272). It is otherwise if the amount can be computed by a mere process of arithmetic, from the facts which are admitted in the defence.

2. *Ei incumbit probatio qui dicit non qui negat.*—The burden of proof lies as a rule upon the party who has in his pleading maintained an affirmative proposition; a negative is in general incapable of proof. He who makes an assertion must prove it true; otherwise the jury will deem it untrue. If no evidence at all be given, the opposite proposition, the negative of the issue, will be taken as established (see *Catherwood v. Chaubaud*, 1823, 1 Barn. & Cress. 150). The precise form into which the pleading is cast does not matter; the judge will look at the substance of the allegation. Thus, it is immaterial whether the defendant pleads that "the plaintiff's cause of action is barred by the Statute of Limitations," or that "the plaintiff's cause of action did not accrue within six years before action"; in either case the plaintiff must prove that his cause of action did arise within the prescribed period, or show facts which take the case out of the

statute (*Wilby v. Henman*, 1834, 2 Car. & M. 658). So in a plea of privilege it does not matter whether the defendant pleads that he published the words "*bona fide*," or that he published them "without malice"; in either case the plaintiff must prove malice, if the occasion be held privileged.

(a) There are, however, exceptions to this rule that the burden of proof lies on the party who affirms. Thus in an action for malicious prosecution, it is for the plaintiff to establish the want of reasonable and probable cause (*Abrath v. North-Eastern Railway Co.*, 1886, 11 App. Cas. 247). If the defendant in an action of libel has pleaded a plea under sec. 2 of Lord Campbell's Act (*q.v.*), the *onus* lies on him to prove that the libel was inserted without gross negligence (per Wills, J., in *Peters v. Edwards*, 1887, 3 T. L. R. 423). So, too, if the issue be whether A. be still living or not, the party asserting the negative, viz. that A. is not living, must prove his death; because the presumption is in favour of the continuance of life till the contrary be shown (*Wilson v. Hodges*, 1802, 2 East, 312; 6 R. L. 427). In an action on a bill of exchange, as soon as the defendant has proved that the acceptance of the bill was obtained by fraud it is for the plaintiff to prove that he took the bill in good faith, and for value and without notice of the fraud (*Tatam v. Haslar*, 1889, 23 Q. B. D. 345).

So in a criminal case, the *onus* lies on the prosecution to prove every fact, affirmative or negative, which is an essential ingredient in the crime alleged. Thus, if an act only becomes unlawful when done without the consent of some person, it is for the prosecution to prove that that person's consent was not given; it is not for the defendant to prove that it was (*R. v. Hazy & Collins*, 1826, 2 Car. & P. 458). In some cases, however, the Legislature has expressly thrown the burden on the prisoner. Thus by sec. 58 of the Larceny Act, 1861, it is a misdemeanour to be in possession of housebreaking implements "without lawful excuse"; and the section expressly enacts that the proof of such excuse shall lie on the prisoner. So under sec. 2 of the Merchandise Marks Act, 1887, the burden is thrown on the defendant of proving that he acted without intent to defraud.

(b) There are some matters which need not be proved at all, *e.g.* the law of England, public statutes, official seals, and certain facts so well known that the Court takes judicial notice of them without proof. (See JUDICIAL NOTICE.) Again, neither party need prove that which the law already presumes in his favour, *e.g.* the plaintiff in an action of libel need not prove that the words are false; the holder of a bill of exchange need not prove that he gave value for it. (See PRESUMPTIONS.)

**Burgage Tenure.**—At a time when the freeholder was very often bound by his tenure to perform some services for his lord, which were other than the payment of a rent, for example, to follow his lord in warfare, or to help in the ploughing of his lord's demesne, the man who held a house in a borough often discharged all his obligations by the payment of money. At such a time tenure at a money-rent, though it may be occasionally found in the open country, is characteristic of the towns; it is burgage tenure. The common, though mistaken, belief that the term *socage* pointed to service done with the plough made the contrast more emphatic. Hence in the twelfth and thirteenth centuries we find that burgage is co-ordinated with socage as one of the known tenures (*e.g.* Magna Carta: "*si aliquis teneat de nobis per . . . socagium vel burgagium*"). At a somewhat later time, when the rural socagers are no longer doing much agricultural labour for their lords, burgage is no longer co-ordinated with,

but is subordinated to socage. Littleton (s. 162) says of it, "and such tenure is but socage." During the earlier period, tenure at a money-rent without other service, is so marked a feature of the larger towns, that the lord who introduces such a tenure into a small rural town or village is often spoken of as thereby creating "a free borough," since one of the chief privileges that burgesses enjoy is that they are rarely bound to labour in the fields of their lords. Very often the burgesses had a royal charter, which declared that they were not to be impleaded, or, at all events, were not to be impleaded touching their burgage tenements, in any Court save that of the borough. The jurisdiction of the king's central Courts being thus excluded, a customary law could grow up in the borough about such matters as inheritance, dower, curtesy, and the like. Very commonly the custom allowed a tenant to devise his burgage tenement, and this at a time when, as a general rule, the freeholder had no such power. Again, it was not unusual that the married woman should convey her burgage tenement, not by a fine levied in the King's Court, but by a transaction which took place before the mayor or some other officer of the borough. In these and in many other instances the peculiarities of burgage tenure have been obliterated by modern legislation. About inheritance, dower, and so forth, there appear to be no peculiarities, which are mere consequences of burgage tenure; the aberration, if any such there be, from the ordinary rules of the common law must be proved to be the custom, not of ancient boroughs in general, but of the particular borough that is in question.

Prior to the first Reform Act (2 & 3 Will. iv. c. 45) there were boroughs in which the right to vote in parliamentary elections was annexed to the ownership or occupation of burgage tenements, and the burgage tenements which conferred this right were occasionally, not all, but only some, of the houses in the borough. Subject to certain saving clauses (ss. 31-33) this qualification for the borough franchise was then abolished. [See Pollock and Maitland, *Hist. Eng. Law.*]

**Burgess.**—A person who has a right to vote at the election of the councillors for a borough, and is registered as a voter on the burgess roll. Every person who has, during the twelve months preceding the 15th July in any year, occupied any house, warehouse, shop, or other building within the borough rated to the relief of the poor, and paid the rates assessed thereon, and who has resided in the borough, or within seven miles thereof, during such twelve months, is entitled, whether a man or a woman, to be enrolled as a burgess, unless he or she is under age, is an alien, has been within the preceding twelve months in receipt of poor relief, has been convicted of any corrupt or illegal practice at a parliamentary or municipal election, is undergoing punishment for any treason or felony, or is otherwise disqualified by any Act of Parliament. Women are entitled to be enrolled and vote as burgesses (Municipal Corporations Act, 1882, s. 63), though they cannot be elected to serve on the borough council.

A burgess has the following privileges and duties:—(1) He is entitled to vote at the election of councillors, elective auditors, and revising assessors, and also of the school board; (2) he is eligible for any corporate office, and is liable to fine if he refuses to serve on election; (3) he is eligible and liable to serve on borough juries; (4) he can attend and vote at any town meeting, the consent of which is in some cases a condition precedent to certain acts of the council, *e.g.* to charging the borough fund with the costs of



promoting or opposing any bill in Parliament. But he has otherwise no direct share in the administration of the borough.

**Burgess Roll.**—The official list of the names and addresses of the burgesses of a borough; the register at any municipal election, and also at the election of the county councillors to be returned for a borough. The overseers annually make out a list of the burgesses in each parish in the borough for submission to the revision Court. Where a municipal borough is wholly or partially coincident with a parliamentary borough, the revising barrister revises the municipal list at the same time as the parliamentary lists. In other cases, the revision Court consists of the mayor and two revising assessors, who are elected by the burgesses annually by ballot. The revising assessors must be burgesses who are qualified to be councillors, but who are not on the council. When the parish burgess lists have been revised and signed, the revising authority delivers them to the town clerk, and the printed copy of these revised lists, examined and signed by the town clerk, is the burgess roll of the borough. It must be completed on or before 20th October in each year; it comes into operation on 1st November in each year, and continues in operation for twelve months. Where the borough has no wards, there is one general roll for the whole. Where the borough has wards, the burgess roll is made in separate rolls, one for each ward. No burgess may be enrolled in more than one ward roll (see secs. 44 and 45 of the Municipal Corporations Act, 1882). A qualified person, who by any accident is not enrolled as a burgess, is not a burgess (*ibid.* s. 9). But an inaccurate description will suffice, if it be commonly understood who is meant (s. 241). At the end of the roll will be found a list of those persons who, though not burgesses, are yet entitled to be elected councillors—persons, that is, who occupy property within the borough, and reside beyond seven miles, yet within fifteen miles, of the borough.

**Burglary (and Kindred Offences).**—*Burglary.*—The original meaning and derivation of the term burglary are somewhat obscure. In the earlier law-books and judicial records it is called *bargeria* or *bugeria*, and defined as felonious breaking and entering in time of peace into churches, houses of others, or the walls or gates of cities or boroughs (Britton, i. c. 42). In this sense it seems to be a translation of the Old English “burgh-brice.” The offenders were originally styled *burgatores* or *burgisores*. In later books and decisions the crime is called *burgularia* (cp. *burgulator*), from which the present name is derived. Etymologically this word should come from *burgulum*; but like all law terms it has been made the subject of bad philology, and *burgulator* is derived by Coke (3 Inst. 63) from *burgum*, a house, and *larron* or *latro* (see Murray, *Dict. Eng. Lang.*, s.v. “Burglar”). The offence as first defined is closely allied to *hamesocn* or *hamefare* (cp. *Hamesucken*, German, *Heimzucht*), an attack on a man in his own home, and *hus-brice* (housebreaking), a forcible or furtive entry into the house of another (see 1 Pollock and Maitland, *Hist. Eng. Law*, 491; 5 Seld. Soc. Publ. 50, 58, 62, 67, 69).

*Hamesucken* (Bracton, *de Cor.* cxxiii. 3f 144b, “Mirror of Justice”; Seld. Soc. Publ. 28, 58, 102) still survives in the law of Scotland, and is a felony, which until 1887 (50 & 51 Vict. c. 35, s. 66) was capital (see Anderson, *Crim. Law of Scot.*, 1892, p. 82); and housebreaking, which in Scotland is still a purely common law offence, appears to retain there the

## BURGLARY (AND KINDRED OFFENCES)

elements originally held sufficient to constitute *burgh-brice*, or *hus-brice*, but to be treated only with reference to theft, and as an aggravation thereof (Anderson, *Crim. Law of Scot.*, 1892, 106, 107). The term burglary is not used in Scottish law.

It is suggested by Stephen (*Hist. Crim. Law*, vol. ii. p. 56; vol. iii. p. 150) that burglary originated from hamesucken, but the gist of that offence appears to have been the entry of a home with a body of men to assault (see 3 Co. Inst. 65; 1 Leges. Henrici. Prim. lxxx. 10), and not the entry of a strong walled place (see 1 Pike, *Hist. Crim.* 141), and it is submitted that burglary and housebreaking, like forcible entry, were regarded as offences which involved open force and the destruction of the defences of an Englishman's house, regarded as his burgh or castle, rather than personal insult or injury of the man himself. In the *Mirror of Justices* hamesucken is treated as a sin against the holy peace (see 7 Seld. Soc. Publ. p. 28). All alike were forms of private war, which did not necessarily involve pillage, and in the early precedents, in which the term burglary is not used, it is difficult to say whether the offence was hamesucken or burglary (see 9 Seld. Soc. Publ. pp. 8, 10, 23, 24, 34).

The Roman law specially punished housebreakers (*effractoires*, see French Penal Code as to *vol avec effraction*) and nocturnal thieves in dark or dusk; but burglary and its Anglo-French and Anglo-Latin equivalents appear to deal with a really Teutonic or common law crime, and not one of the civil or Roman law (but see Greek *τορχωρυχία*).

The time at which the attack or breaking took place does not appear to have been originally an essential element of the offences, although nocturnal entry must have been regarded as a circumstance of aggravation. Nor was, nor is, robbery or theft, or intent to steal, the essential, although it is the commonest object of entry (see 1 Seld. Soc. Publ. pl. 122, 124; 9 ditto, pp. 8, 10). But the reference to twilight or night was very early introduced into the charges (9 Seld. Soc. Publ. 114): "Venerunt latrones ad domum A inter canem et lupum et fregerunt parietem domus suae et intraverunt et percuserunt A cum cultello . . . et bona asportaverunt" (9 Seld. Soc. Publ. 10, 34).

By the seventeenth century the definition of burglary was restricted to cases of "breaking and entering in the night into the 'mansion-house' of another with intent to commit felony, whether the felonious intent is or is not executed" (3 Co. Inst. 63); Hale (1 P. C. 548) and Hawkins (bk. i. c. 38, ss. 1, 17) extend the definition so as to include ecclesiastical buildings, irrespective of any niceties about sacrilege, etc., and walls and gates of a walled town. But in practice the definition of Coke is treated as accurate, and, with the substitution of dwelling-house for mansion-house, is that still in use, no attempt having ever been made in any statute to define what is burglary at common law, though the offence is from an early date recognised in the statute-book.

The Statute de Officio Coronatoris of 1276 (4 Edw. 1.) directs levy of hue and cry for all burglaries. Even before this date it was an ordinary part of the coroner's duty to inquire as to burglaries (9 Seld. Soc. Publ. pl. 4). And provision was made in the articles of the Eyre (1 Stat. Realm. 233) as to inquiry concerning burglars (*de burgatoribus*) and other malefactors or the receivers of such (accessories after the fact) in time of peace.

Simple burglary (*i.e.* burglary where bodily fear was not caused) was a felony with benefit of clergy (25 Edw. III. c. 4, *pro clero*) until 1547 (1 Edw. VI. c. 12, *Powlter's case*, 1615, 11 Co. Rep. 29, 31). All forms of burglary were ousted of clergy in 1576 (18 Eliz. c. 7). See BENEFIT OF CLERGY.

In 1690 (3 & 4 Will. & Mary c. 9) the severity of this punishment was extended to accessories before the fact.

In 1698 a person who apprehended a burglar became entitled to a Tyburn ticket, *i.e.* a certificate exempting from parish and ward offices (10 & 11 Will. III. c. 23).

In 1837 the death penalty for burglary was abolished; and now under sec. 52 of the Larceny Act, 1861, as modified by sec. 1 of the Penal Servitude Act, 1891, 54 & 55 Vict. c. 69, it is punishable by penal servitude for life, or not less than three years. See PREVIOUS CONVICTION; POLICE SUPERVISION.

Apart from these enactments, common law burglary remains unaffected by statute, except that the extended application of the term "mansion-house" or dwelling-house, resulting from judicial decisions, is now restricted by sec. 53 of the Larceny Act to the house itself or buildings having communication therewith, either immediate or by a covered and inclosed passage. The definition of burglary is, however, extended so as to include breaking *out* of a dwelling-house in the night by a person who has entered the house (without breaking) to commit a felony, or, who being in the house has committed a felony therein (24 & 25 Vict. c. 96, s. 51, which replaces 7 & 8 Geo. IV. c. 29, s. 11). And breaking and entering *and* committing a felony (whether by day or night) in any building which is within the curtilage of a dwelling-house, and occupied therewith, but is not part of the dwelling-house, is felony punishable by penal servitude from three to fourteen years; accessories to burglary are punishable as felons, (see ACCESSORY; 24 & 25 Vict. c. 95, ss. 53, 55; 54 & 55 Vict. 69, s. 1). Where the intent to commit felony is proved and the offender has broken but not entered, he may be convicted of the attempt to commit burglary (*R. v. Spanner*, 1872, 12 Cox C. C. 155).

The right to kill a burglar has been much canvassed from the earliest times. Bracton (*de Coronâ*, c. xxiii. 3*f* 144*b*) limits the right to cases where the killer is in personal danger. There is an early precedent where killing a burglar, who resisted arrest, was held lawful (9 Seld. Soc. Publ. 79); but it appears to have been the practice to pardon the slayer of the burglar. In 1530 (23 Hen. VIII. c. 5) an enactment was made entitling a man to acquittal who killed any evilly-disposed person attempting burglariously to break mansion-houses in the night. But this seems to have been meant not to override Bracton, but to extend the protection in practice even to cases where the felony had not yet been committed; and the right is now limited to cases of necessary defence of self, family, or property. See HOMICIDE.

The following offences closely resemble burglary in their definition and incidents:—

*Churchbreaking.*—(a) It is felony to break and enter, at any hour, any church or other place of divine worship *and* to commit any felony therein; or being in such church or place of worship to commit a felony therein and afterwards break out. The punishment is penal servitude for life, or not less than three years (24 & 25 Vict. c. 96, s. 50; 54 & 55 Vict. c. 69, s. 1).

(b) It is also felony to break and enter any such place with intent to commit a felony therein. The punishment is penal servitude for three to seven years, etc. (24 & 25 Vict. c. 96, s. 57; 54 & 55 Vict. c. 69, s. 1). The existence of this provision renders it unnecessary to fall back on the earliest definition of burglary.

*Housebreaking.*—The distinction between this offence and burglary lies only in the hour at which it was committed.

(a) By an Act of 1541 (33 Hen. VIII. c. 12, s. 13) it is felony to break or enter, with intent to steal therein, any royal palace, or any place in which the Sovereign is resident. The offender, if apprehended on the verge of the Court, is liable before the steward of the Marshalsea and a jury (see 4 Co. Inst. c. 18, and VERGE).

The other enactments, beginning with 12 Anne, c. 7, and now collected in the Larceny Act, 1861, are as follows:—

(b) Entering (without breaking into) a dwelling-house by night with intent to commit a felony therein, is a felony punishable by penal servitude from three to seven years (24 & 25 Vict. c. 96, ss. 1, 53, 54; 54 & 55 Vict. c. 69, s. 1).

(c) Breaking and entering (at any hour) into a dwelling-house, school-house, shop for the sale of goods (*R. v. Sanders*, 1839, 9 Car. & P. 79), warehouse, including one for storage only (*R. v. Hill*, 1843, 2 Moo. & R. 458), or counting-house, and committing a felony therein; or being therein and breaking out after committing a felony, is a felony punishable by penal servitude from three to fourteen years.

(d) Breaking and entering any dwelling-house or building within the curtilage, or any other of the buildings named in (c), with intent to commit a felony therein, is a felony punishable by penal servitude from three to seven years (24 & 25 Vict. c. 96, s. 57; 54 & 55 Vict. c. 69, s. 1).

*Stealing in a Dwelling-house.*—Two statutory felonies also exist closely connected with burglary and housebreaking.

(a) Stealing in a dwelling-house any chattel, money, or valuable security of the value of £5 or over (24 & 25 Vict. c. 96, ss. 1, 60).

(b) Stealing any chattel, money, or valuable security in a dwelling-house, and by any menace or threat putting anyone therein in bodily fear (24 & 25 Vict. c. 96, s. 61).

The punishment for each offence is the same, penal servitude from three to fourteen years, or imprisonment, with or without hard labour, for not over two years (24 & 25 Vict. c. 96, ss. 60, 61; 54 & 55 Vict. c. 69, s. 1; and see LARCENY).

*Preparations for Burglary, etc.*—It is also a misdemeanour to be found by night—(a) armed with any dangerous or offensive weapon or instrument whatever with intent to break into any (particular) building and commit any felony therein (*R. v. Jarrald*, 1863, 32 L. J. M. C. 258); (b) without lawful excuse (proof whereof lies on the possessor), in possession of any implement of housebreaking; or (c) in any building with intent to commit a felony therein.

The punishment is penal servitude from three to five years, with power to give penal servitude from three to ten years on a second or subsequent conviction (24 & 25 Vict. c. 96, ss. 58, 59, re-enacting 15 & 16 Vict. c. 19, s. 1).

The offenders can be arrested without warrant (14 & 15 Vict. c. 19, ss. 11–13; 24 & 25 Vict. c. 96, s. 103).

Under sec. 4 of the Vagrancy Act, 1823, 5 Geo. IV. c. 83, as amended by subsequent legislation (34 & 35 Vict. c. 112, s. 5; 54 & 55 Vict. c. 69, s. 7), similar offences if committed in the daytime can be punished summarily. See VAGRANT.

In the case of all the offences specified in this title the Court can award imprisonment for not over two years, with or without hard labour, instead of penal servitude (54 & 55 Vict. c. 69, s. 1), and may add to any other punishment recognisances, with or without sureties, to keep the peace (24 & 25 Vict. c. 96, s. 117).

*Procedure, etc.*—1. All the offences under this title (except sacrilege under 24 & 25 Vict. c. 96, s. 50) can now be tried at Quarter Sessions (5 & 6 Vict. c. 38, s. 1; 59 & 60 Vict. c. 57). Serious cases of burglary must, however, be committed for trial at assizes. None of the offences is within the Vexatious Indictments Acts (22 & 23 Vict. c. 17; 30 & 31 Vict. c. 35, s. 1). The costs of prosecution are payable out of the local rate (7 Geo. IV. c. 64, s. 22; 24 & 25 Vict. c. 96, s. 121; and see PROSECUTION, *Costs of; REWARDS*).

2. In the Indian Penal Code (arts. 442–460) the difficulties and complexities of the English treatment of offences above enumerated have been avoided by dealing with all under the common head House-Trespass (see Mayne, *Ind. Cr. Law*, 1896, 194–199, 740–743). The classification in English law is inartistic and unsatisfactory, and the mass of collected decisions (of which the vast majority are prior to the Act of 1861) increases the unnecessary complexity and confusion in the law, which might be summed up in two or three simple enactments covering all that is necessary. The only satisfactory way to deal with them is to interpret the terms which assimilate or differentiate the offences and are capable of misconstruction by the advocate of the accused.

“Night” is now defined as the interval between 9 p.m. and 6 a.m. on the next morning (24 & 25 Vict. c. 96, s. 1, which reproduces 7 Will. IV. and 1 Vict. c. 86, s. 4). Before 1837 the day was divided for purposes of burglary into day, twilight (*crepusculum inter canem et lupum*), and night. The breaking and entry must both be at night in burglary, but not necessarily on the same night if the intent of both is to commit a felony (*R. v. Smith*, 1820, Russ. & R. 417).

“Breaking” includes—

- (i.) Actual breaking of any external part of the building.
- (ii.) Opening or lifting any closed door, window, shutter, lock, or bolt.
- (iii.) Entry by threat, artifice, or collusion with persons inside; and even
- (iv.) Entry by a chimney (*R. v. Brice*, 1821, Russ. & R. 450; see Stephen, *Dig. Crim. Law*, 5th ed., 282).

It appears not to include breaking of cupboards, etc. (Fost. *Cr. Law*, 109), but to include the breaking of inner doors of rooms (*R. v. Gray*, 1722, 1 Stra. 481).

“Entering” means insertion through an open door or window or any aperture of any part of the offender’s body or of any instrument in his hand (*R. v. Bailey*, 1818; Russ. & R. 341).

“Place of religious worship” extends to vestries and like annexes of the building (*R. v. Evans*, 1842, C. & M. 298), and is not to be confined to buildings of the Established Church or registered places of worship. Prior to 1861 (under 7 & 8 Geo. IV. c. 29, s. 10; *R. v. Warren*, 1834, 6 Car. & P. 335 n.) dissenting chapels were not protected.

“Dwelling-house” means a permanent building, not a temporary building (such as a booth in a fair), in which the owner or tenant or any of his family (including his menial servants) habitually sleep at night. It includes separate tenements in the same building and separate flats or sets of chambers, but does not include buildings within the curtilage which have not immediate or enclosed communication with the house (24 & 25 Vict. c. 96, s. 53), nor buildings occupied by day for trade or business in which a servant or caretaker sleeps (*R. v. Flannagan*, 1810, Russ. & R. 187; *R. v. Stock*, 1810, Russ. & R. 185). The very numerous and not very consistent decisions on this subject are collected in Archbold, *Cr. Pl.*, 21st ed., 569–576.

**As to the meaning of curtilage, see CURTILAGE.**

In some of the offences it is enough to prove intent to commit a felony, in others its actual commission must be proved; but in no case, except under 24 & 25 Vict. c. 96, ss. 60, 61, is there any limitation of the kind of felony to be proved, and it is quite immaterial whether it is murder, rape, arson, or theft, and whether the felony is one at common law or statutory.

3. In indictments for all these forms of criminal trespass it is necessary to specify the particular building and to give its local description by the parish, etc., in which it lies, and the name of the owner, even if it is a place of worship (subject in each case to the power of amendment given by 14 & 15 Vict. c. 100, s. 1). Where burglary is charged, the word "burglariously" (*in burgeriâ*) must be used. The second felony which was committed or intended must be stated almost if not quite as specifically as if the accused were being indicted for it (see. *R. v. Bailey*, 1853, 23 L. J. M. C. 13). A charge of larceny in a dwelling-house is in accordance with an old-established practice (contrary to the ordinary rule as to duplicity) often comprised in the same count with a charge of burglary or housebreaking (Archb., 21st ed., 73, 78); and where the graver charge is negatived, the jury can convict of the larceny (*R. v. Brooks*, 1842, C. & M. 543); or if two are indicted they can convict one of burglary, the other of larceny (*R. v. Butterworth*, 1823, Russ. & R. 520).

[*Authorities*.—Britton, c. x. s. 1; Bracton, *de Coronâ*, cxxiii. 3; 1 Pollock and Maitland, *Hist. Eng. Law*, 491; 3 Co. Inst. 63; 1 Hale, P. C., 547; Hawk., P. C., bk. i. c. 38; 2 Bl. Com. 223; Greaves, *Crim. Law Cons. Acts*, 106; Archb. *Cr. Pl.*, 21st ed., 566–583; Russ. on *Crimes*, 6th ed., 1–76; Stephen, *Dig. Crim. Law*, 5th ed., 282; 3 Stephen, *Hist. Crim. Law*, 150.]

**Burglary Insurance.**—A new development of insurance business that has grown up in recent years. By the contract of insurance the insured is indemnified against loss sustained by him through burglary. The law applicable is the same as under contracts of fire insurance. See FIRE INSURANCE; and *Roberts v. Security Co.* [1897], 1 Q. B. 111.

**Burial.**—It is the duty of a person's executors to see that the body of the deceased is buried in a manner suitable to the estate he has left. It is now common, however, for bodies to be cremated instead of buried, and this is quite lawful, provided, as was pointed out in *R. v. Price*, 1884, 12 Q. B. D. 247, cremation does not take place to prevent the coroner holding an inquest. See CREMATION. In the case of the death of a pauper, the guardians or overseers of the parish in which the death occurred are empowered, by sec. 31 of the Poor Law Amendment Act, 1844, to bury the body at the expense of the parish to which the pauper was chargeable; but it appears that every householder in whose house a dead body lies is bound by the common law to bury the body decently (*R. v. Stewart*, 1840, 12 Ad. & E. 773). Bodies cast up by the sea, estuaries, or tidal rivers must be interred at the expense of the parish where the bodies are found. (See the Burial of Drowned Persons Act, 1808, and the Burial of Drowned Persons Act, 1886.)

In *R. v. Stewart* (*ubi supra*) it was decided that every person dying in this country, and not within certain ecclesiastical prohibitions, is entitled to Christian burial (*q.v.*), i.e., as was generally understood, according to the

rites of the Church of England. By the rubric of the Burial Service in the Book of Common Prayer, that service is not to be used "for any that die unbaptized, or excommunicate, or have laid violent hands upon themselves." Previous to the passing of the Burial Laws Amendment Act, 1880, if a dead body was buried in a churchyard or other consecrated ground, the only religious service that could be performed was the Burial Service of the Church of England, but now, by the statute just mentioned, this has been altered. On the requisite notice specified by the Act being given to the incumbent, a burial may take place either with or without any Christian religious service; power is also given to the clergy of the Church of England to officiate, if they please, with the burial service in unconsecrated ground.

Suicides were in former times buried in a highway with a stake driven through the body, but this barbarity was abolished by 4 Geo. IV. c. 52, and now by the Interments (*felo de se*) Act, 1882, the bodies of such persons may be interred in any of the ways authorised by the Burial Laws Amendment Act, 1880; but this does not authorise a clergyman of the Church of England to use the burial service in such a case. The bodies of executed criminals are buried within the precincts of the prison where the execution took place, unless a Secretary of State has appointed some other place. [See Phillimore, *Ecclesiastical Law*, 2nd ed., vol. i. pp. 650 *et seq.*; Brooke Little, Baker, *Burials*, 6th ed.] See BURIAL GROUND; CHURCH-YARD; NONCONFORMIST; CEMETERIES; MORTUARY; CAPITAL PUNISHMENT.

**Burial Board.**—First appointed in Metropolis by 15 & 16 Vict. c. 85, which provides for formation of Boards of not less than three or more than nine persons, on resolution of the vestry, convened on requisition of ten or more ratepayers. This was extended to all parishes not in the Metropolis by 16 & 17 Vict. c. 134. The Act contains very full provisions as to meetings of the Board, appointment of officers, auditors, etc., and borrowing powers, with sanction of the vestry and approval of the Commissioners of H.M. Treasury; also provisions for providing burial grounds, and for facilitating interments therein, and as to fees payable. By the Act 34 & 35 Vict. c. 33, which is construed as one with the Burial Acts, 1852 to 1862, provision is made that, where approval of Secretary of State is required under Burial Acts 20 & 21 Vict. c. 81, and 23 & 24 Vict. c. 64, the vestry shall not appoint such Board until a resolution of such vestry, declaring expediency of such appointment, has been passed, and approved by Secretary of State. The sexton of a parish has a right to enter burial ground, and perform his duties, without the sanction of the Burial Board, and to toll bell in chapel at burial, as part of burial rite of Church of England (*Burial Board of St. Margaret's, Rochester v. Thompson*, 1871, L. R. 6 C. P. 445). By Local Government Act, 1894, powers of Burial Board may by resolution be transferred to parish council.

**Burial Ground, Offences In.**—1. It is felony to steal, or to rip, cut, sever, or break with intent to steal anything made of metal fixed in any burial ground. The punishment on conviction is penal servitude from three to five years, or imprisonment with or without hard labour for not over two years. The offender may, if a male under sixteen, also be whipped (*R. v. Jones, Dears. & B. C. C. 555*; 2 Russ. on *Crimes*, 6th ed., 225); or the Court may, instead of imposing any of these punishments, bind the offender over to keep the

peace and be of good behaviour (24 & 25 Vict. c. 96, ss. 4, 31, 117; 54 & 55 Vict. c. 69, s. 1). It is also a misdemeanour unlawfully and maliciously to destroy or damage any statue, monument, or other memorial of the dead, or other ornament or work of art in a churchyard or burial ground. The offender may be sentenced to imprisonment with or without hard labour for six months, and, if a male under sixteen, may be whipped (24 & 25 Vict. c. 97, s. 39). These offences are triable at Quarter Sessions (5 & 6 Vict. c. 38, s. 1).

2. Under sec. 7 of the Burials Act, 1880, 43 & 44 Vict. c. 41 (Osborne Morgan's Act), it is an indictable misdemeanour (1) to be guilty of any riotous, violent, or indecent behaviour at a burial; (2) wilfully to obstruct a burial or a service thereat; (3) to deliver any address in a churchyard or consecrated graveyard not permitted by the Act or otherwise permitted under lawful authority; (4) under colour of any religious service or otherwise to wilfully endeavour to bring into contempt or obloquy the Christian religion, or the belief or worship of any Christian Church or denomination, or the members or any minister of such Church or denomination, or any other person. These provisions only apply where a person not a member of the Established Church is interred without its services in a churchyard, or the consecrated part of a burial ground or cemetery.

As to other offences in churchyards, see BRAWLING; SACRILEGE.

3. The Cemeteries Clauses Act, 1847, 10 & 11 Vict. c. 65, contains provisions for the protection of burial grounds, which are incorporated (1) with the Burials Acts (by 15 & 16 Vict. c. 85, s. 40), and (2) with the Public Health Interments Acts, 1879, 42 & 43 Vict. c. 31 (by s. 3), an Act which (by s. 1) is to be read as one with the Public Health Act, 1875, 38 & 39 Vict. c. 53. Under sec. 58, persons who (1) wilfully destroy or injure any building, wall, or fence belonging to a cemetery or burial ground; or (2) wilfully destroy, deface, or injure any tablet, inscription, or gravestone therein; or (3) destroy or injure any tree or plant therein; or (4) climb or disfigure any wall thereof; or (5) put up any bill therein or on any wall thereof; or (6) do any other wilful damage therein, are liable on summary conviction to forfeit a sum not exceeding £5.

Under sec. 59 a like penalty is incurred by persons who (1) play games or sports, or discharge firearms (except at a military funeral) in a cemetery or burial ground; (2) wilfully and unlawfully disturb any persons assembled therein to bury a body; or (3) commit any nuisance therein.

The penalties for these offences are recoverable where the cemetery is that of a private company, by the company only, by the procedure prescribed under secs. 140-149, 151-160 of the Railways Clauses Consolidation Act, 1845, 10 & 11 Vict. c. 65, ss. 58, 59, 62. The effect of this incorporation and the modifications introduced by the Summary Jurisdiction Acts is to cause profound confusion. See *East London W. W. v. Kyffin* [1895], 1 Q. B. 55.

In the case of a burial ground which is vested in a burial board or district council as sanitary authority, the penalties are recoverable only by the board or council, but the proceedings are taken under secs. 251-256 of the P. H. Act, 1875, as modified by the Summary Jurisdiction Act, 1884, 47 & 48 Vict. c. 43.

These provisions can be supplemented by penalties under by-laws and regulations made by the authority controlling the cemetery or burial ground (10 & 11 Vict. c. 65, s. 38).



**Burning.**—See ARSON.

**Business Day.**—The Bills of Exchange Act, 1882, provides that where by the Act the time limited for doing any act or thing is less than three days, in reckoning time non-business days are excluded. Non-business days, for the purposes of the Act, mean: (a) Sunday (*q.v.*), Good Friday (*q.v.*), Christmas Day (*q.v.*); (b) a bank holiday under the Bank Holidays Act, 1878, or Acts amending it; (c) a day appointed by Royal proclamation as a public fast or thanksgiving day. Any other day is a business day (s. 92). See BANK HOLIDAYS.

For the purposes of the rules of practice, it is provided that where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Sunday, Christmas Day, and Good Friday shall not be reckoned in the computation of such limited time (Order 64, r. 2). And where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on such days, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken, if done or taken on the day on which the offices shall next be open (*ibid.* r. 3).

In the County Courts there is a rule corresponding to rule 2 quoted above, but Sundays and other non-business days are excluded only where the period limited is twenty-four or forty-eight hours, and days when the offices are closed and bank holidays are excluded (C. C. Rules, Order 51, r. 18). The provisions of rule 3 quoted above are enacted for the County Court by C. C. Rules, Order 51, r. 19.

**But.**—A covenant, condition, or limitation may be introduced by the word “but,” in addition, opposition, or alternatively to, or in qualification of, a previous covenant, condition, or limitation. It has the two meanings of “moreover” and “except,” “otherwise” or “without this,” and in general is the less formal equivalent of “provided always,” expressive of either meaning, *e.g.* a devise to A. for life if she should not marry again, but, if she should, then to B.

In *Treloar v. Bigge*, 1874, L. R. 9 Ex. 151, there was a covenant by the lessee not to assign without the consent of the lessor, “but such consent is not to be arbitrarily withheld”; and Amphlett, B., said, if it were necessary to carry out the intention of the parties these words might amount to a covenant. But it was held (and also in *Sear v. House Property Co.*, 1880, 50 L. J. Ch. 77), that the words “only qualified the lessee’s own covenant, and did not form an independent covenant of the lessor”; and this is the more usual. The words “but that” have the same effect (*Elphinstone, Interpretation of Deeds*, p. 469).

Where there was a question whether a gift was intended to be cut down by a gift over (*Abbott v. Middleton*, 1858, 7 H. L. 68), Lord St. Leonards said (p. 99), “There is a great deal of difference between gifts cutting down a previous interest, which, of course, always may be, and generally are, introduced with some word stronger than ‘but.’ We must distinguish between cases where the previous gift is properly cut down and cases in which there is a short, or imperfect, statement of the event upon which the testator intended to found the gift over” (see Stroud, *Jud. Dict.*).

**Butcher.**—1. The trade of a butcher, so far as it relates to the sale of meat, is not subject to any licence, nor to any special regulations not equally applicable to other sellers of human food, unless he deals in the flesh of horses, asses, or mules (52 & 53 Vict. c. 11). See HORSEFLESH. He is subject to the Weights and Measures Acts, and to the Adulteration Acts.

A butcher must not kill or sell meat on Sunday under penalty of 6s. 8d., which appears to be recoverable either summarily or by action by a common informer, see Sunday Observance Act, 1627 (3 Chas. I. c. 2, made perpetual by c. 5), and *R. v. Brotherton*, 1726, 2 Stra. 702. He also falls within the general prohibition of Sunday trading (29 Chas. II. c. 29, s. 1, and 34 & 35 Vict. c. 87), and is forbidden to travel or arrive at his inn or lodgings under penalty, which in 3 Chas. I. c. 2, is 40s., and in 29 Chas. II. c. 29, is 5s. These enactments, though unrepealed, are not enforced and are virtually superseded by the statutes which permit travelling by boat (7 & 8 Geo. IV. c. lxxv. ss. 1, 3), HACKNEY CARRIAGE, or RAILWAY, on that day. See SUNDAY.

It is an indictable misdemeanour at common law for a butcher knowingly to sell or possess for sale, or a carrier to take to market meat unfit for human food (*Burnby v. Bollett*, 1848, 16 Mee. & W. 644, where the old statute and cases are considered; *R. v. Stevenson*, 1861, 3 F. & F. 106; *Shillito v. Thompson*, 1875, 1 Q. B. D. 12; *R. v. Jarvis*, 1862, 3 F. & F. 108; *R. v. Crawley*, 1862, 3 F. & F. 109); and if the meat causes death the seller can be indicted for manslaughter (*R. v. Kempson*, 1893, Oxford Circuit, noted 28 L. Jo. 477). See ADULTERATION.

Summary remedies for the exposure, possession, or sale of unsound meat are given by the Public Health Act, 1875, 38 & 39 Vict. c. 55, ss. 116–119, 308, and the Public Health London Act, 1891, 54 & 55 Vict. c. 76, s. 47, as to which, see FOOD.

In some cases it has been held that the butcher does not warrant the soundness and fitness for human food of the meat which he sells (*Emmerton v. Matthews*, 1862, 31 L. J. Ex. 139; *Smith v. Baker*, 1878, *Times*, December 20); but this doctrine appears to be inconsistent with *Burnby v. Bollett*, 1848, 16 Mee. & W. 644.

2. If he adds to his trade the business of boiling blood, bones, or tripe, he falls within the provisions of the Public Health Acts, as to OFFENSIVE TRADES (*q.v.*).

Abattoirs and slaughter-houses are subject to licence and stringent regulation. See SLAUGHTER-HOUSE.

These provisions are additional to a butcher's liabilities at common law if a public nuisance is created by his business (*R. v. Stephens*, 1866, L. R. 1 Q. B. 702).

A butcher may not slaughter or dress cattle in a street so as to cause nuisance or annoyance, except overdriven cattle or animals which have met with an accident and ought to be killed at once (10 & 11 Vict. c. 87, s. 28 (5); 38 & 39 Vict. c. 55, s. 171; 57 & 58 Vict. c. 22), and he is subject to the provisions of sec. 28 of the Towns Police Clauses Act, 1847, as to interference by his business with the comfort and convenience of passengers in any street. In London similar provision is made by secs. 64, 65, 66 of Michael Angelo Taylor's Act (57 Geo. III. c. xxix.), which so far as they affect butchers seem unaffected by any subsequent legislation.

3. The canine or feline butcher, *i.e.* the cat's meat man, is not subject to the laws affecting butchers, but apparently he needs a hawker or pedlar's certificate, under the Pedlars Act, 1871, 34 & 35 Vict. c. 96, ss. 4, 23; or

the Hawkers Act, 1888, 51 & 52 Vict. c. 23, s. 3. See HAWKERS AND PEDLARS.

**Butlerage.**—Prisage and butlerage were ancient hereditary revenues of the Crown levied on imported wines. In the thirteenth century the place of the arbitrary requisitions of earlier times appears to have been taken by a uniform toll called the *recta pris*a or prisage, which was calculated at one cask on each side of the mast. In 1302 Edward I., in the *Carta Mercatoria*, agreed with alien merchants to commute prisage for a fixed duty of two shillings on every hogshead of wine imported by them; but the native merchants refused to adopt the composition, and remained subject to prisage. In 1372 an additional duty was granted by Parliament upon all wines whether imported by native or foreign merchants, which was charged at so much the tun, and termed the tunnage of wines. Both prisage and butlerage, however, continued to be levied by the king's butler, under the heading of the Butlerage of England. The Act for the abolition of old tenures (12 Chas. II. c. 24, s. 13) provided that it was not to prejudice the ancient duties of butlerage and prisage of wines. In the course of time the proceeds of these at certain ports passed by grant from the Crown into private hands. In 1803, 43 Geo. III. c. 156 empowered the Treasury to treat for the purchase of them from the Crown, and the grantees, and in 1806, 46 Geo. III. c. 79 confirmed a contract for the purchase of prisage and butlerage of wine from the Duke of Grafton, who was the principal owner. In 1809, 49 Geo. III. c. 98, s. 35, provided that no wine was to be admitted in certain ports to entry for prisage, but was to pay the duties of regular importation. By sec. 36 it was provided that after the 5th July 1809 the duty called butlerage should cease.

[See 1 Blackstone, *Commentaries*, 314; Hall, *History of the Custom-Revenue in England*; Anson, *Law and Custom of the Constitution*, Part ii., "The Crown"; Dowell, *History of Taxation*.]

**Butter.**—See ADULTERATION.

**Butty Collier.**—Murray's dictionary defines "butty" as (1) a confederate or "mate," or (2) a middleman between proprietors of mines and workmen, who engage to work the mine and raise coal or ore at so much a ton; and defines "butty gang" as a gang of men to whom a portion of the work in some large engineering enterprise is allotted, and who divide the proceeds equally among themselves.

According to the evidence in the case next cited, butty colliers are working colliers who contract with their employers to hew and raise coal or ironstone by piece-work, either doing the work themselves alone or employing other colliers. Such colliers were held to be "artificers," within the Truck Act (1 & 2 Will. IV. c. 37), in *Bowers v. Lovekin*, 1856, 6 El. & Bl. 584; but *quære* whether this is not in conflict with the later case of *Sleeman v. Barrett*, 1864, 2 H. & C. 934, and to the true construction of the Act (see TRUCK ACT; Macdonell, *Master and Servant*, p. 368 n.).

A custom affecting the butty colliers of Staffordshire was found in the case of *Bannister v. Bannister*, 1841, 9 Car. & P. 743, that if they leave off work without notice they are not entitled to be paid for "gate roading," "heading," or "coals undergone." If they give notice, or lose their

employment because the mine ceases to be worked, they are entitled to be paid for these things at once by their employers.

### **Buying of Pleas.**—See MAINTENANCE.

**By.**—The meaning of “by” in the Statute of Limitations, 3 & 4 Will. iv. c. 27, s. 42, barring the recovery of arrears of rent, interest, etc., except within six years after the same has become payable “by any distress, action, or suit” has been considered in several cases. “By” is strictly construed, and is not equivalent to “in.” So that, as the section does not extinguish the right itself, the arrears may be obtained “in” an action, as distinguished from “by” an action. Thus, in a foreclosure action the mortgagee would be restricted to six years’ arrears of interest, but as defendant in a redemption action all arrears due under the mortgage would have to be paid. Also, where mortgaged property had been sold under the power of sale, and the proceeds paid into Court in an action for the administration of the estate of the mortgagee, the mortgagee’s trustees were held to be entitled to more than six years’ interest (*Edmunds v. Waugh*, 1866, L. R. 1 Eq. 418, 421; and see also *Marshfield v. Hutchings*, 1887, 34 Ch. D. 721). See Stroud, *Jud. Dict.*

**By-laws.**—The word “by-law” meant originally a law made in and for a “by” or “burh” (i.e. any fortified town or vill)—regulations issued by the local authority for the regulation of a borough. But the word has now attained a wider significance, and includes all orders, ordinances, regulations, rules, and statutes made by any authority subordinate to Parliament.

The subordinate authority must, of course, have power expressly or impliedly conferred on it to legislate on the matters to which the by-law relates. And the by-law which that authority makes must be reasonable in itself; it must not be retrospective, and it must not be contrary to the general law of the land. If these conditions be satisfied, the by-law is binding on all the persons for whom, or throughout the place or district for which, that subordinate authority has power to legislate. A by-law regularly made by a corporate body under its charter “has the same effect within its limits, and with respect to the persons upon whom it lawfully operates, as an Act of Parliament has upon the subjects at large” (per Lord Abinger, C.B., in *Hopkins v. Mayor, etc., of Swansea*, 1839, 4 Mee. & W. at p. 640). “A by-law, though made by, and applicable to, a particular body, is still a law, and differs in its nature from a provision made on or limited to particular occasions: it is a rule made prospectively, and to be applied whenever the circumstances arise for which it is intended to provide” (per cur. in *Gosling v. Veley*, 1847, 7 Q. B. at p. 451). “A by-law is not an agreement, but a law binding on all persons to whom it applies, whether they agree to be bound by it or not. All regulations made by a corporate body, and intended to bind not only themselves and their officers and servants, but members of the public who come within the sphere of their operation, may be properly called ‘by-laws’” (per Lindley, L. J., in *London Association of Shipowners and Brokers v. London and India Docks Joint Committee* [1892], 3 Ch. at p. 252). A by-law may be good as against a particular class of persons (e.g. the members of the corporation

making the by-law), and yet not binding on strangers. Thus, every borough council may make by-laws for the government of the town which will bind all who come into it; the homage of a manor may make by-laws for the management of the common lands which will bind all commoners; a railway company may make by-laws for the regulation of its traffic which will bind all its passengers and servants. But such by-laws will not affect the outside public, or derogate from their vested rights (*Mace v. Philcox*, 1864, 15 C. B. N. S. 600; 33 L. J. C. P. 124). Disobedience to a by-law is generally punished by imposing a fine; a by-law cannot be made to inflict imprisonment on, or to forfeit the goods of, the offender, unless such a power be expressly given by statute (*Clark's case*, 1596, 5 Rep. 64 a; *Kirk v. Nowill*, 1786, 1 T. R. 118). But a chartered trading corporation may make a by-law, forfeiting the stock or shares of any member of the corporation who does not pay his calls (*Child v. Hudson's Bay Co.*, 1723, 2 P. Wms. 207).

The power to make by-laws may be given (1) by charter (either expressly or impliedly), (2) by custom, or (3) by statute.

(1) *By Charter*.—The power to make by-laws is usually given in express terms by the charter creating the corporation. When not so expressed, still the power is deemed to have been granted by implication; for it is essential to the very existence of a corporation (Selwyn's *Nisi Prius*, 13th ed., p. 1129). Where there is an express grant of such a power, it can only be exercised by the persons on whom the power is expressly conferred, and in the manner and for the purposes, if any, specified. But if the charter be silent, the power rests in the members of the corporation at large for all purposes within the charter (*Child v. Hudson's Bay Co.*, *supra*).

(2) *By Custom*.—Where any body, corporate or otherwise, have no charter and no statutory power to make a by-law, they must show a custom entitling them so to do. It was laid down in *James v. Tutney*, 1639, Cro. (3) 497, that "a custom in a manor to make by-laws for the regulation of a common or great waste, parcel of the manor, is good." But a by-law to exclude a commoner from the common would be bad; for it wholly debars him of his right, instead of merely regulating his exercise of it (Comyn's *Digest*, "By-laws," ii. 162; *De Morgan v. Metropolitan Board of Works*, 1880, 5 Q. B. D. 155, 158). So, too, a court leet may by prescription make by-laws to regulate their own common (*Lord Crumwell's case*, 1573, Dyer, 322; *Earl of Excester v. Smith*, 1669, 2 Keble, 367; Cart. 177), and a court baron may appoint a field-reeve to look after the good order of the common (*Lambert v. Thornton*, 1697, 1 Raym. (Ld.) 91). A guild or trade fraternity may by custom make by-laws for the regulation of their own trade; and so may a borough (see the *Chamberlain of London's case*, 1590, 5 Rep. 62 b). But any guild or fraternity which makes or enforces a by-law which is in diminution of the king's prerogative, or against the common profit of the people, without first submitting the same to be examined and approved by the chancellor, treasurer, and chief justices, or the justices of assize, will incur a fine of £40 (19 Hen. VII. c. 7, s. 1).

(3) *By Statute*.—The power of making by-laws has been very freely bestowed by Parliament on local authorities and public companies.

(a) The council of every borough has power under sec. 23 of the Municipal Corporations Act, 1882, "to make such by-laws as to them seem meet for the good rule and government of the borough, and for the prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the borough."

The by-laws may be enforced by fine not exceeding £5; and they must be published in the borough at least forty days before they come into force. This power of a borough council to make by-laws is not restricted to offences which are already punishable in some other method, not summary. Thus, a by-law made by a borough council, imposing a penalty on any person who shall frequent or use any street or other public place for the purpose of bookmaking and betting, is not *ultra vires*, although it creates a new offence; so long as it is aimed at persons standing on the pavement with books in their hands lying in wait for customers, and does not include a person who happens to be in the street and casually makes a bet there (*Burnett v. Berry* [1896], 1 Q. B. 641; 65 L. J. M. C. 118; and see *Mantle v. Jordan* [1897], 1 Q. B. 248). And a by-law made with the object of preventing any annoyance or disturbance from shooting galleries, swing-boats, roundabouts, etc. is not bad, although it extends to land adjoining or near to a street or public place (*Teale v. Harris*, 1896, 60 J. P. 744; and see *Shillito v. Thompson*, 1875, 1 Q. B. D. 12; *Strickland v. Hayes* [1896], 1 Q. B. 290). But any by-law prohibiting persons other than freemen from opening a shop or carrying on any lawful trade within a borough, would now be bad (Municipal Corporations Act, 1882, s. 247); though such a custom was held good in 1610 (8 Rep. 124*b*, 128*a*; and see *Chamberlain v. Conway*, 1889, 53 J. P. 214; *Byrne v. Brown*, 1893, 57 J. P. 741; and *Nash v. Manning*, 1894, 58 J. P. 718).

(b) A borough council has additional powers of making by-laws in its capacity as an urban district council. For urban district councils can make by-laws under several sections of the Public Health Act, 1875; see especially sec. 44 as to ash-pits, sec. 80 as to common lodging-houses, sec. 90 as to houses let in lodgings, sec. 113 as to offensive trades, sec. 157 as to new streets and buildings, sec. 164 as to public pleasure grounds, sec. 167 as to markets, sec. 169 as to slaughter-houses, etc.; while under sec. 171 they obtain all the powers given by the Town Police Clauses Act, 1847, 10 & 11 Vict. c. 89, with respect to obstructions and nuisances in the streets, fires, places of public resort, hackney carriages and public bathing. By the Public Health Acts Amendment Act, 1890, 53 & 54 Vict. c. 59, further powers are given to an urban district council. It may make by-laws as to public sanitary conveniences (s. 20), buildings, streets, and water-closets (s. 23), and pleasure boats (s. 44). Such by-laws do not come into force until they have been confirmed by the Local Government Board; and an opportunity must be given to the ratepayers of inspecting the proposed by-laws before they are confirmed (see secs. 182 to 188 of the Act of 1875). A penalty not exceeding £5 may be imposed, which will be applied in the manner provided by sec. 254.

(c) A rural district council has some of the powers mentioned above, and may acquire others (see secs. 3 and 23 of the Amendment Act of 1890).

(d) A county council has the same power as the council of a borough to make by-laws for the good rule and government of its county, and for the suppression of nuisances not otherwise summarily punishable. By-laws made under this power must be passed by a meeting consisting of at least three-fourths of the members of the council; they may be enforced by a fine not exceeding £5; they must be published for at least forty days before coming into operation; they are punishable on summary conviction; but no by-law may impose a penalty exceeding £5 for any one offence. No county by-law has any force within a municipal borough (51 & 52 Vict. c. 41, s. 16). A county council has also power to make regulations for bicycles (s. 85); and as to the sale of coal under the

Weights and Measures Act, 1889, 52 & 53 Vict. c. 21, s. 28. Any by-law made by a county council for the good rule and government of any district will be construed so as to give all reasonable effect to the object which the council had in view (*Booth v. Howell*, 1889, 53 J. P. 678; *Walker v. Stretton*, 1896, 44 W. R. 525; 60 J. P. 313).

(e) A parish council may make by-laws for regulating parks, recreation grounds, village greens, etc., and as to pleasure boats on any water in such parks or recreation grounds (Local Government Act, 1894, s. 8).

(f) The Harbours, Docks, and Piers Clauses Act, 1847 (10 Vict. c. 27), s. 83, enables a dock company to make by-laws, under its common seal, for a great variety of purposes connected with the use and management of its docks and property. Penalties may be imposed for infringements of these by-laws (s. 84), but no by-laws (except such as relate solely to the company or their officers or servants) have effect unless confirmed as required by sec. 85. Moreover, notices have to be given before they are confirmed (ss. 86, 87), and, when confirmed, they have to be published, as directed by the Act (s. 88). When duly made, confirmed, and published, the by-laws become binding on all parties (s. 89), and they can only be altered by other by-laws similarly made and confirmed. Similar powers are contained in the Companies Clauses Act, 1845 (8 Vict. c. 16), ss. 124–127; the Railways Clauses Act, 1845 (8 Vict. c. 20), ss. 108–111; the Commissioners Clauses Act, 1847 (10 Vict. c. 16), ss. 96–98; the Market and Fairs Clauses Act, 1847 (10 Vict. c. 14), ss. 42–49; the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 128, 200–208; the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), ss. 68, 69, 71; the Tramways Act, 1870 (33 & 34 Vict. c. 78), ss. 46–48; the Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57), s. 7; and various other Acts. A board of conservators has power to make by-laws under secs. 39 to 45 of the Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71).

*Confirmation.*—When power to make by-laws is conferred by statute, a condition is generally imposed that before such by-laws come into operation they must be submitted to some confirming authority, which has power to disallow them, wholly or in part. Thus, under sec. 86 of the 10 Vict. c. 27, the proposed by-laws must be submitted to a judge of one of the superior Courts, or to the justices at Quarter Sessions. All by-laws made by any local authority under the Public Health Act, 1875, must be submitted to the Local Government Board, which supervises and can alter or amend them (47 Vict. c. 12). For instance, the board has disallowed a by-law prohibiting all boys from throwing stones in the town, a by-law prohibiting persons from singing hymns in the streets, a by-law forbidding strangers to bring dogs into the town, and a by-law forbidding “lounging” on Sunday afternoon. All by-laws made by a borough or county council (not under sec. 187 of the Public Health Act, 1875) must be submitted to a Secretary of State forty days before they come into force; and if within those forty days the Queen, with the advice of her Privy Council, disallows any by-law, it will not come into force (45 & 46 Vict. c. 50, s. 23; 51 & 52 Vict. c. 41, s. 16). All by-laws made by a local authority, under the Weights and Measures Act, 1889, must be approved by the Board of Trade (52 & 53 Vict. c. 21, s. 28).

*Unreasonableness.*—But even though a by-law has been duly approved and confirmed by the appointed authority, it may yet be held invalid by the Court, if it be either unreasonable in itself, or contrary to the general law of the land. It is impossible to lay down any general rule which will determine when a by-law is unreasonable. As Lord Russell, C. J., says in

*Burnett v. Berry* [1896], 1 Q. B. at p. 643, "Authorities cited on the construction of other by-laws are of very little use in assisting the Court to decide whether the particular by-law before them is or is not good. Each must be judged by its own language." The most recent cases on the subject, however, are *Martin v. Clark*, 1893, 62 L. J. M. C. 178; *Huffam v. North Staffordshire Railway Co.* [1894], 2 Q. B. 821; *Kent County Council v. Humphrey* [1895], 1 Q. B. 903; *Hanks v. Bridgman* [1896], 1 Q. B. 253; *Lowe v. Volp*, *ibid.* 256; and *Alty v. Farrell* [1896], 1 Q. B. 636.

**C. F. I.**—These letters in a mercantile contract denote "cost, freight, and insurance," and mean that the price named in the contract includes the expense of the goods, their carriage, and their insurance during the transit to the purchaser. Blackburn, J., describes their effect in *Ireland v. Livingston*, 1871, L. R. 5 H. L. 406. Whether under such a contract the property in the goods passes on their shipment or the risk of the seller continues till delivery of them, is not clear; but the latter is certainly not the rule where there are any words to show that the seller's risk is meant to end before then, and there seems good reason for adopting the former. Thus where goods were sold "c. f. i., to be shipped at a foreign port, and on arrival of the ship in England the buyer was to adopt the charter-party and bill of lading and pay the price," it was held that the duty of the seller ended on shipping the goods, and though he failed to deliver the goods, no cause of action arose within the jurisdiction for which notice of writ could be served abroad (*Wancke v. Wingren*, 1889, 58 L. J. Q. B. 519). And it has been held in Scotland that where goods were sold c. f. i., and loaded on board a vessel chartered by the seller at a Scotch port, to be carried to a French port, the property and risk in the goods passed on shipment to the buyers; and the opinion was expressed and adopted by the majority of the Court that a contract c. f. i. is a contract under which the seller undertakes certain obligations which would not be incumbent on him otherwise, but that these additional obligations have no reference to the question of delivery, and the risk is not thereby retained with the seller till delivery (*Delaunier v. Wyllie*, 1889, 17 Sess. Ca. (4th) 167).

**Cab.**—Cabs, or, as the Acts call them, hackney carriages, are regulated by three sets of statutes—viz. (1) the London Hackney Carriage Acts of 1831, 1843, 1850, and 1853, the Statute 16 & 17 Vict. c. 127, the Metropolitan Public Carriages Act of 1869, and the London Cab Act, 1896; (2) the Town Police Clauses Act (10 & 11 Vict. c. 89, ss. 37 to 49, 51 to 68) applying in towns outside the Metropolis, which are regulated by special Acts incorporating this statute; and (3) police regulations and by-laws under the Public Health Act, 1875, ss. 171, 172, applying in urban districts outside the Metropolis and the last-mentioned towns. It will be sufficient in this article to deal with the London Acts, which are hereinafter referred to as follows:—H. C. A., 1831, meaning the London Hackney Carriage Act of 1831. The Metropolitan Public Carriages Act of 1869 is referred to as M. P. C., 1869. The provisions of the Town Police Clauses Act are very similar to those of the London Acts.

**Definition.**—A hackney carriage means any carriage for the conveyance of passengers which plies for hire within the metropolitan police district,



the city of London and its liberties, and is not a stage carriage (or what is commonly known as an omnibus), that is a carriage in which the passengers are charged separate fares for their seats (H. C. A., 1869, ss. 2, 4; 1843, ss. 2, 3; 1831, s. 4).

*Condition, Fittings, and Licence of Cab.*—The cab must be certified to be in a fit condition for public use by the Commissioner of Police (H. C. A., 1853, ss. 1, 2; 30 & 31 Vict. c. 134, s. 17), and must bear a plate indicating that it is so certified. It must also be licensed by a licence renewable yearly by the Home Secretary (M. P. C., 1869, ss. 6, 7), but such licence may be issued by the said Commissioner under the Home Secretary's directions (*ibid.* s. 11). If an unlicensed carriage plies for hire the owner is liable to a penalty (M. P. C., 1869, s. 7), and the driver also, unless he was ignorant of the want of licence (*ibid.*). A carriage plying for hire, or found on a stand without a mark distinguishing it as licensed is deemed to be unlicensed (*ibid.*). The owner of an unlicensed brougham waiting to be hired in a railway station is liable for these penalties, whether he is driving himself or not (*Clarke v. Stanford*, 1871, L. R. 6 Q. B. 357; *Allen v. Tunbridge*, 1871, L. R. 6 C. P. 481). The cab must be provided with a check-string (H. C. A., 1831, s. 48). The number of persons it may carry must be shown upon it, and also the table of fares (M. P. C., 1869, ss. 9, 10; H. C. A., 1853, ss. 5, 9). It must carry a lamp lighted between the hours prescribed (M. P. C., 1869, s. 9), and must not have any notices or advertisements so fixed as to obstruct the light or ventilation in it, or cause annoyance to any passenger (H. C. A., 1853, s. 15).

*Driver.*—The driver must be licensed by the Home Secretary or by the Commissioner by his direction (M. P. C., 1869, ss. 8, 11; H. C. A., 1843, ss. 8, 10, 14 to 21, 24, 25), and he must have a ticket and wear it conspicuously and produce it to any person for inspection when required (H. C. A., 1843, s. 17). While the driver is employed by a cab proprietor the proprietor is required to keep the driver's licence and to enter upon it the days when the driver entered and quitted his service (H. C. A., 1843, s. 8), and to produce both the driver and the licence if summoned to do so before a magistrate (H. C. A., 1843, ss. 21, 35). Offences by the driver are to be indorsed upon the licence. Disputes between the driver and proprietor, including questions of wages and of neglect or default by the driver, are to be determined by a magistrate (s. 22), and it is provided that no sum claimed from a driver on account of the earnings of the cab shall be recoverable in any Court unless under an agreement in writing, signed by the driver in the presence of a competent witness (s. 23). The agreement needs no stamp (*ibid.*). When the driver leaves the service of the proprietor the latter must return his licence, but he may keep it for twenty-four hours in order to enable him to take proceedings against the driver before a magistrate (s. 24). The proprietor is liable to an action for damages if he defaces the licence, as, for instance, by writing a bad character upon it (*Rogers v. Macnamara*, 1853, 14 C. B. 27; *Norris v. Birch* [1895], 1 Q. B. 639), and a magistrate has jurisdiction upon complaint by the driver to award compensation for such defacement to him (*l.c.*). The licence may be revoked or suspended by a magistrate (*ibid.* s. 25).

By the practice of the London cab trade the driver is, in fact, a hirer of the cab, for which he pays an agreed sum per day, keeping the balance of his takings for himself, but, upon the construction of the Hackney Carriage Acts, he is held to be in the position of the servant of the proprietor, so that the latter is responsible in damages for torts committed by the driver in the course of his employment (*King v. London Improved Cab Co.*, 1889, 23

**Q. B. D. 281; *Keen v. Henry* [1894], 1 Q. B. 292).** A driver on his way back to the stables is occupied "in the course of his employment" (*Venables v. Smith*, 1877, 2 Q. B. D. 379). The proprietor is liable to the driver for injuries occasioned to him by reason of the horse or cab not being reasonably fit for their work (*Fowler v. Lock*, 1874, L. R. 10 C. P. 90). See further as to the duties of the driver, *Regulations*, below.

**Fares.**—The Home Secretary is authorised to make regulations fixing the fares by time or by distance, but it is not compulsory on the driver to take passengers at fares less than those chargeable in 1869 (M. P. C., 1869, s. 9). These fares were 6d. a mile within four miles of Charing Cross, and 1s. a mile beyond that radius (provided that the cab be discharged outside it), part of an uncompleted mile counting as a mile (H. C. A., 1853, Sch. A; 16 & 17 Vict. c. 127, s. 13); 6d. extra, in addition to the fare, for each adult person beyond two, two children under ten counting as one person (H. C. A., 1853, Sch. A).

By time the fare was 2s. for one hour or less (H. C. A., 1853, Sch. A), and 6d. for every fifteen minutes, or uncompleted part of fifteen minutes, beyond one hour (H. C. A., 1853, s. 15). When more than two persons are carried inside a cab with more luggage than can be there carried, 2d. extra is payable for each package carried outside (H. C. A., 1853, Sch. A). The Home Secretary has exercised his powers to increase these fares by providing that in case of a cab hired outside the radius the fare shall be 1s. per mile; raising the charge for waiting to 8d. per fifteen minutes for hansoms; and for hiring by time to 2s. 6d. for the first hour for hansoms also; and outside the radius to 2s. 6d. for the first hour, and 8d. for each extra fifteen minutes for all cabs. No driver is compellable to take a passenger for any one drive a greater distance than six miles (M. P. C., 1869, s. 9), or to drive for more than one hour (H. C. A., 1853, s. 7), or to be hired by time between 8 p.m. and 6 a.m. (*ibid.* Sch. A). No fare is to be less than 1s. (30 & 31 Vict. c. 134, s. 36).

There are penalties on the passenger for refusing to pay the fare (H. C. A., 1831, s. 41); for hiring a cab knowing, or having reason to believe, that he cannot pay the fare, or with intent to avoid payment; for fraudulently endeavouring to avoid payment; and for refusing to pay and refusing to give his address, or giving a false address with intent to deceive (London Cab Act, 1896). The offences under the last-cited Act may be punished by imprisonment without the option of a fine, and the whole or part of the fine (if any) may be applied in compensating the driver (*ibid.*). There are also penalties on drivers for demanding more than the proper fare (H. C. A., 1853, s. 17), or the agreed fare (H. C. A., 1831, ss. 44, 45). An agreement to pay more than the legal fare is not binding, and any excess actually paid beyond the legal fare (H. C. A., 1831, s. 43), or the agreed fare (*ibid.* s. 45), may be recovered.

A driver required to wait may demand a reasonable sum as a deposit, and also payment of his fare already earned (H. C. A., 1831, s. 47; H. C. A., 1853, s. 4); the charge for waiting is 6d. for every completed fifteen minutes (H. C. A., 1853, s. 4), and 8d. for hansoms (see above). No back fares are payable (*ibid.*).

**Stands.**—Stands for cabs are appointed by the Commissioner of Police or the Home Secretary (M. P. C., 1869, s. 9; 13 & 14 Vict. c. 7, ss. 4 to 6; H. C. A., 1843, s. 30).

**Regulations.**—The driver must have a book of fares, and produce it when called upon (H. C. A., 1853, s. 5), and must deliver to the hirer when required a card bearing the number of the cab (*ibid.* s. 8). He must carry

the number of persons for which he is licensed, and a reasonable quantity of luggage for any person hiring or intending to hire his cab, and must drive to any place within the limits of the Acts, not exceeding six miles distance, to which he shall be required to drive by the hirer, or drive for any time not exceeding one hour, if so required, and must drive at a reasonable and proper speed, not less than six miles an hour (*ibid.* s. 17). "Place" in the section last cited includes any place to which cabs are admitted to bring their passengers (*Ex parte Kippins* [1897], 1 Q. B. 1). The obligation of the driver to carry anyone who wishes to hire him when he is not already hired, applies to all cabs standing in any street or place and having their number plates fixed (H. C. A., 1831, s. 35). A railway station has been held not to be a place within the meaning of the last-cited section (*Case v Storey*, 1869, L. R. 4 Ex. 319).

The proprietor of a licensed cab must not withdraw it from hire for two consecutive days or two days in one week without just cause, unless he gives ten days' notice to the Commissioner of Police (H. C. A., 1853, s. 16). Property left in a cab must be forthwith taken by the driver to the nearest police station (H. C. A., 1853, s. 11), or dealt with as the Home Secretary otherwise directs (M. P. C., 1869, ss. 9 and 10).

There are penalties on the driver for causing obstruction by loitering or otherwise, as by drawing across the street, or attempting to prevent other drivers being hired, or similar misconduct (H. C. A., 1831, ss. 51, 52; 1843, s. 33); plying for hire elsewhere than at some standing or public place (*Skinner v. Usher*, 1872, L. R. 7 Q. B. 423) appointed for the purpose (H. C. A., 1843, s. 33); allowing any person to ride on the cab without the consent of the hirer (H. C. A., 1831, s. 50; 1843, s. 34); leaving his cab unattended (H. C. A., 1831, s. 55); driving furiously, or by other wilful misconduct endangering any person or property, or being drunk or abusive (H. C. A., 1831, s. 56; 1843, s. 28).

Penalties which a driver is ordered to pay under the Acts of 1831 and 1843 may be recovered from, or ordered to be paid by, the proprietor of the cab, who may in turn recover from the driver (H. C. A., 1831, ss. 27, 28; H. C. A., 1843, s. 28).

*Legal Proceedings.*—Penalties under the Acts may be recovered by summary proceedings (M. P. C., 1869, s. 13; see also the various Acts). It is provided that complaints under the Acts of 1831 or 1843 must be made within seven days (H. C. A., 1843, s. 38). Compensation can be awarded to a driver for his loss of time if he is summoned and the complaint against him is withdrawn or dismissed (H. C. A., 1831, s. 57). A magistrate has power to award as compensation in respect of damage occasioned by wanton or furious driving or carelessness or wilful misbehaviour of the driver, a sum not exceeding £10 and costs to the person injured (H. C. A., 1843, s. 28). Such compensation is a bar to proceedings by action to recover the damages unless the person injured refuses to consent to the magistrate exercising his jurisdiction (*Wright v. London General Omnibus Co.*, 1877, 2 Q. B. D. 271). A magistrate has also jurisdiction to hear and determine disputes between the driver and the proprietor in respect of wages or earnings, or any deposit of money, or any penalties paid by the proprietor on account of the driver's negligence or wilful misconduct, and to award compensation for injury done by the driver to the proprietor's property (H. C. A., 1843, ss. 22 to 24). Orders by a magistrate under the Acts for the payment of sums of money, not being penalties, are not enforceable by imprisonment (*R. v. Kerswill* [1895], 1 Q. B. 1).

**Cabbages.**—Theft, destruction, and damage of these vegetables fall within the provisions of the Larceny Act, 1861, 24 & 25 Vict. c. 96, ss. 36, 37, and the Malicious Damage Act, 1861, 24 & 25 Vict. c. 97, ss. 23, 24, with reference to offences as to cultivated vegetable products, whether they are or are not growing in gardens.

**Cabin.**—In a cargo-carrying ship the cabin is not generally allowed to be used for the purposes of the cargo, but is reserved to the owner of the ship. A contract by the shipowner "to receive a full and complete cargo" does not entitle the charterer to use the cabin; and where the charter-party freight was £3, 5s. a ton, and the charterer's agents stored shippers' goods in the cabin, it was held that such goods were liable to pay freight to the shipowner at the current market rate of freight, namely, £7 a ton (*Mitcheson v. Nicol*, 1852, 7 Ex. Rep. 929). Similarly, the charterer cannot in such a charter carry passengers in the cabin; and if he does their passage money goes to the owner (*Shaw, Savill, & Co. v. Aitken*, 1883, 1 C. & E. 195). But such a right may be given by custom in the trade, if not excluded by the words of the contract, and a master has been allowed in this way to carry goods in the cabin (*Donaldson v. Forster*, 1789; Abbott, 5th ed., 208, now 343); and it may be so stipulated in the contract (*Neill v. Ridley*, 1854, 9 Ex. Rep. 677). Formerly the master of a ship received among other allowances a cabin allowance for messing the officers of the ship on the voyage; e.g. an agreement between the captain of an East Indiaman and his owners, provided that he was "to receive £10 per month for wages, and £150 for all cabin and other allowances to commence from the day of victualling the ship, and for which he is to mess the chief and second officers for the whole voyage, and a surgeon outwards and also a surgeon homewards if he brings one," and was held not to deprive him of his right to primage (*Best v. Saunders*, 1828, Moo. & M. 208); nor did an agreement for "£10 a month wages, one-third of all passage moneys, and the owner to find the cabin" (*Charleton v. Cotesworth*, 1825, Ry. & M. 175); see PRIMAGE. For the rights of cabin passengers, see PASSENGERS.

**Cabinet, The.**—It will be convenient in the first place to describe the Cabinet as it now exists, and then to trace briefly the stages by which it attained its present development.

1. The Cabinet at the present day is the principal directing force in English government. Though only an informal council of the Crown, possessing no legal powers, and even unknown to the law (in other words, belonging, not to the law, but to the custom of the constitution (*q.v.*)), it exerts a guiding and controlling influence over the Crown and Parliament, over the legal Executive and the legal Legislature, which secures the harmonious working of our institutions and the unity of our government. Cabinet ministers are individually (1) Privy Councillors, (2) Ministers of the Crown, (3) members of one or other House of Parliament, (4) chosen from the party which possesses a majority in the House of Commons. At their head, as president and spokesman, is the Prime Minister, whose office is indissolubly bound up with the Cabinet, and like it a creation not of law but of custom. The number of ministers (see MINISTRY) admitted to the Cabinet is variable. The Lord Chancellor, the Lord President of the Council, the Lord Privy Seal, the five Secretaries of State, the First Lord of the Treasury, the Chancellor of the Exchequer, and

the First Lord of the Admiralty, are now always in the Cabinet. In 1874, Mr. Disraeli restricted his Cabinet to twelve; Lord Salisbury's present Cabinet of nineteen members is the largest in recent times. Large Cabinets often prove unwieldy, and there has always been a tendency to form within them an inner circle of the more influential members. The Prime Minister usually holds the office of First Lord of the Treasury, and may combine with it another office, such as the Chancellorship of the Exchequer. Lord Salisbury has twice chosen to combine the Premiership with the charge of the Foreign Office. There is no exception to the rule that Cabinet ministers must be Privy Councillors, but occasionally distinguished members of previous administrations have sat in the Cabinet without office; and still more rarely a member of the Cabinet has remained for some time without a seat in Parliament, as Mr. Gladstone, from December 1845 to July 1846. The Prime Minister may be either a Peer or a Commoner; but, as Mr. Gladstone has pointed out, "the overweight of the House of Commons is apt, other things being equal, to bring its Leader inconveniently near to a Premier who is a Peer."

The first step in the formation of the Cabinet, is the appointment of the Prime Minister by the Crown; in this, however, the Crown has a very fettered choice, and often no choice at all, for it must choose a Prime Minister who will command the confidence of the party in the majority of the House of Commons, and under whom the other leaders of the party will be willing to work. Often there will be only one possible candidate. Where the claims of the different party leaders are nearly balanced, the personal preference of the Sovereign may suffice to turn the scale. This happened in Lord Melbourne's case in 1834, and there may be more recent instances. The other members of the Cabinet are appointed by the Crown on the recommendation of the Prime Minister. But here again the Prime Minister must choose colleagues whom the Crown and the House of Commons will accept. At the same time, they will not be precisely the men whom the party in the House of Commons would have chosen for itself. Bagehot's statement that the Cabinet is elected by the majority in the House of Commons is too loose, and does not correspond accurately with the facts.

The following attempt to state the accepted rules which govern the Cabinet (1) in its internal relations, (2) in its relations to the Crown, (3) in its relations to Parliament, is based on the authorities referred to below.

(1) As to internal relations, the proceedings of the Cabinet are secret and unrecorded, and no public reference may be made to what has passed at a Cabinet meeting without first obtaining the leave of the Crown. The advice which it tenders is unanimous, and is generally communicated to the Crown by the Prime Minister, but sometimes takes the form of a Cabinet minute. The Crown may not inquire of the Prime Minister, nor should a Cabinet minute disclose, the lines of division in the Cabinet. Individual members of the Cabinet are responsible for its collective decisions; and, unless they are willing to accept such responsibility, it is their duty to resign. The principle of collective responsibility is not impaired by any internal arrangements which the Cabinet may make for disposing of the varied business which comes before it. It has been said that in every Cabinet there is an inner council who largely dictate its policy. Further, of late years, owing partly to the size of modern Cabinets, and partly to the growth of business, there has been an increasing tendency to appoint committees of the Cabinet to deal with work which would otherwise have come before the full body, thus lightening the work

of the latter, and at the same time ensuring a closer examination of the particular question. In theory, the members of the Cabinet are equal, and the Prime Minister has only one vote should a question be pressed to a division; but, whereas the resignation of an ordinary Cabinet minister merely creates a vacancy, the resignation of the Prime Minister brings the administration to an end. When, however, as happened in 1894, the Prime Minister retires on grounds of age or health, his colleagues need not vacate their offices under the Crown, if they are confirmed in them by the new Prime Minister.

(2) To explain the relations of the Prime Minister and the Cabinet to the Crown and the Executive, it is necessary to premise that by law the Executive is vested in the Crown, acting not alone but through responsible ministers. In all such executive action it is a constitutional rule that the Crown should allow itself to be guided by the advice which the Cabinet may tender. The one exception is the act of dismissing the Cabinet, and this exception is more apparent than real, for it has been settled since 1807 that the new ministers must accept responsibility for the dismissal of their predecessors. George III. dismissed Cabinets supported by a majority of the House of Commons in 1784 and again in 1807, and his action was supported by the country; but William IV.'s dismissal of the Whig Cabinet in 1835 proved unsuccessful, as the constituencies returned a Whig majority on the dissolution which followed, and the king was obliged to take back the Melbourne Cabinet, strengthened rather than weakened by his action. No such attempt has since been made, and only in very exceptional circumstances could the Crown hope to appeal successfully from a Cabinet supported by the House of Commons to the constituencies. When the House of Commons withdraws its confidence from the Cabinet, one or other must go; but it is usual for the Crown to allow the defeated ministers to dissolve Parliament and appeal from the House of Commons to the constituencies. Should the result be adverse, the verdict must be accepted. Subject to this one exception, it is the constitutional rule that the Crown must act on the advice of the Cabinet. This does not, however, preclude the Sovereign from exercising, to use Mr. Gladstone's words, "a direct and personal influence in the work of government." "The Crown is entitled on all subjects coming before the ministry to knowledge, and opportunities of discussion unlimited save by the iron necessities of business." In the controversy between the Court and Lord Palmerston in 1850, "the Crown was right in demanding time and opportunity, of course with a due reserve for the exigencies of urgent business, for a real and not a merely perfunctory consideration of draft despatches." The published memoirs of the present reign disclose more than one instance in which the Crown has induced the Cabinet to reverse the action of an individual minister, or to reconsider a decision of its own. So, too, the rule that the Crown should give its sole and exclusive confidence in public affairs to its responsible advisers has not precluded the Sovereign from exercising a mediating influence between parties to avert a constitutional crisis, as in the case of the disestablishment of the Irish Church. As has been said, the Prime Minister is the organ of communication between the Crown and the Cabinet. He speaks with its united voice, and is not to disclose internal differences of opinion or to endeavour to undermine the position of any of his colleagues. On the other hand, each minister has the right of direct access in regard to the affairs of his own department. With regard to the Executive, the Cabinet only advises the Crown in matters which are of

very exceptional importance in themselves, or which have given rise to departmental differences; ordinary business is dealt with by the responsible minister at the head of the department. The decision, whether a particular matter should be made a Cabinet question is in the first place for the minister at the head of the department; but it may also be settled by the Prime Minister, who is entitled to exercise a general supervision over every department of business. In foreign affairs, when the offices of Prime Minister and Foreign Secretary are not united in one person, as at the time of writing, the supervision of the Prime Minister is unusually close and continuous.

(3) The relation of the Prime Minister and Cabinet to the House of Commons is twofold. On the one hand, the Cabinet depends for its existence upon the confidence of the House of Commons. If the House withdraws its confidence, it must resign, or appeal to the constituencies by a dissolution. On the other hand, the Cabinet includes the chosen leaders of the majority in the House of Commons; the individual members of the majority are pledged to support it, and cannot withdraw that support without striking a blow at themselves and their party, as well. When, therefore, a Cabinet possesses a large and homogeneous majority, it is rarely defeated on questions involving confidence until the composition of the House of Commons has been altered by the constituencies at a general election. With regard to executive matters, while Cabinet ministers, as the confidential advisers of the Crown, control the legal Executive, they are in turn liable to have their action questioned by the House of Commons. The House may require such information from ministers as the interests of the public service will allow; it may discuss their conduct, and, if dissatisfied, may withdraw its confidence from the entire Cabinet or a single minister, and so bring about a resignation. But the House of Commons is not itself an executive body; it cannot issue any executive orders; and often it has not the means of informing its judgment enjoyed by ministers. Therefore, when serious issues are involved, ministers are bound to act upon their own judgment, leaving to the House of Commons the responsibility of withdrawing its confidence if it disapproves of their action.

The business of legislation and taxation, on the other hand, is in the legal province of Parliament, and especially of the House of Commons; but here also the Cabinet, as including the leaders of the party in power, exercises powers scarcely inferior to those which it wields over the Executive. No tax can be imposed but by its initiative; and in legislation at the present day no private member's bill has any chance of passing if opposed, unless it be favoured by the Cabinet. Further, nearly the whole time spent by the House of Commons in legislation is given up to the Cabinet. It is for the Cabinet to decide what bills are to be brought in, what their provisions are to be, which of them are to be pressed forward and which abandoned. Their proposals may be modified by friendly or hostile criticism, or prevented from passing within the limits of the session, or defeated in the House of Lords; but, with all these limitations, it is scarcely too much to say that at the present day the Cabinet has absorbed the largest share of legislative power in the State. Opposing parties are now often judged by the constituencies upon their legislative promises or performances, and it falls to the Prime Minister and the Cabinet as the leaders of the party in power to give effect to its legislative programme. So close is the connection of the Cabinet and the House of Commons that when the Prime

**Minister** is a peer, the colleague who acts at once as leader of the House of Commons and spokesman of the Cabinet there, must tend to approach, if not to surpass, his chief in authority and influence.

With regard to the House of Lords, it is only necessary to say that the Cabinet does not depend for its continuance in office upon possessing the confidence of the House of Lords. The legislative powers of that House will be more conveniently discussed under the head **HOUSE OF LORDS**.

2. The early history of the Cabinet must be traced in its connection with the Crown rather than with Parliament. In the time of James I., to go back no further, important business of State was usually transacted before the King in Council, that is to say at meetings of the Privy Council. The Council also acted through committees meeting in the absence of the Sovereign and reporting to the Council. But the number and composition of the Privy Council must at all times have rendered it unsuitable for the most confidential business. Bacon in his *Essay on Counsel*, 1612, writing of the inconveniences of counsel, says that the practice of France and Italy had introduced Cabinet Councils, a remedy worse than the disease. This is the first English application of the term to a royal council. The French jurist, Le Bret, in his *Souveraineté du Roy*, 1632, cited in Esmein, *Histoire du Droit Français*, p. 479, divides the French King's Council into the *Conseil Privé*, corresponding roughly to our Privy Council, and a smaller body known as the *Conseil Étroit*, "qui ne se tient que dans le *cabinet* du roi, où n'entrent que les principaux Ministres de l'État." This would not be an incorrect description of the informal body of Charles I.'s confidential advisers, to which the term Cabinet Council is first applied in Clarendon's *History*, not without a suggestion of disapproval, as to something foreign and new-fangled, involving a departure from the older constitutional usage. And the second remonstrance of the Long Parliament complains of the management of the great affairs of the realm in Cabinet Councils, by men unknown and not publicly trusted.

After the Restoration, the most important decisions were taken by the Sovereign in consultation with a few trusted Privy Councillors rather than at formal meetings of the Council itself or its committees, though Clarendon states in his own defence that, while he was minister, nothing of moment was done until it had been discussed at the Council Board. For instance, the cession of Dunkirk was actively debated there. Still the practice of secret consultation with a small body of advisers, variously known as cabinet, cabal, or junto, continued throughout the reign, and Temple's scheme to restore the active control to a reformed Privy Council was a failure from the outset. The regular meetings of the Council became more and more formal, and merely registered the decisions already arrived at, but its committees still attended to the details of departmental business. Of these the foreign committee included the king's confidential advisers, but was not confined to them; it was formally summoned as a committee of Council, met in the absence of the Crown, and reported to the King in Council. The Cabinet, on the other hand, was summoned informally as a meeting of His Majesty's servants—a practice which still survives—met in the presence of the sovereign until the death of Queen Anne, and kept no record of its proceedings. Such a system made it difficult to fix any responsibility on members of the Cabinet, and it is not surprising that Parliament should have aimed at abolishing it by the provisions in the Act of Settlement (*q.v.*) that "all matters and things relating to the well governing of the kingdom which are properly cognisable in the Privy Council by the laws and custom of this realm shall be transacted there, and all resolutions



taken thereupon shall be signed by such of the Privy Council as shall advise and consent to the same." This provision was repealed before it took effect, or the growth of the Cabinet must have been arrested. In Anne's reign, as has been pointed out, three different bodies are seen at work on the Treaty of Utrecht. The details of the treaty were first considered and reported on by the committee of Council; the treaty then came before the Cabinet; and lastly, it was formally sanctioned by the Queen in Council, but this was a purely formal proceeding, and an attempted opposition was at once suppressed. The work done by the committee of Council has passed to the department of the Secretary of State for Foreign Affairs, but the Cabinet and Council still continue to discharge the same functions as on that occasion. As yet, however, the Cabinet was not always consulted by the Crown in the most important business, still less was its advice invariably followed. The decision to create twelve peers for the purpose of securing a majority for the treaty in the House of Lords was not submitted to the Cabinet. The ascendancy of the Cabinet depends on its close connection with the House of Commons, and this must now be traced.

Since the reign of James I. the right of ministers of the Crown and Privy Councillors to sit in the House of Commons had been admitted; and the ill-conceived effort in the Act of Settlement to exclude the former had been repealed before it took effect. From the Revolution all attempts on the part of the Crown to govern by ministers distasteful to the House of Commons were proving unworkable. William found the difficulty in managing a Tory House of Commons with Whig ministers; Anne endeavoured to govern with a mixed ministry, but Godolphin, her chief adviser in home affairs, himself developed Whig views to conciliate a Whig House of Commons, and partly with the same object insisted on the dismissal of Tories like Nottingham and Harley, thereby to some extent anticipating the powers of a Prime Minister to choose his colleagues. The doctrine of ministerial and Cabinet responsibility to Parliament was steadily growing, but as yet the personal favour of the Sovereign outweighed the favour of the House of Commons. The Hanoverian accession marks an epoch in the growth of the Cabinet. When the Sovereign ceased to preside in person at its meetings, it gradually found a president and a spokesman in the person of the Prime Minister, an office at first as unpopular as the Cabinet had been, and, like it, provided with a name of foreign origin. Walpole at the outset, "a minister given by the king to the people," used his control over the patronage of the Crown to secure the support of the House of Commons, and so obtained an ascendancy which enabled him to force his will upon the Crown, and to procure the dismissal of insubordinate colleagues. In his own person he enjoyed the power of a modern Prime Minister, though he rejected the name; but the Cabinet with which he worked was very different from the modern body. Nominally it was very large, including the Archbishop of Canterbury and the chief officers of the household; in reality the substantial business was transacted by Walpole and a few leading members. The principle of collective responsibility was unknown, and ministers did not stand and fall together. Some of Walpole's colleagues did not trouble to defend him from the attacks which brought about his resignation; nor did they resign with him in a body. After Walpole's time the development of the Cabinet was arrested. Immediately on his accession, George III. set himself to break up both Cabinet system and party government, and in the early part of his reign there was little recognition of the modern constitutional rules. The king endeavoured to act as his own adviser; the members of the Cabinet did

not speak with one voice; and great lawyers like Camden and Mansfield repudiated responsibility for the measures of Cabinets to which they belonged. This contention was rendered more plausible by the continued division of the Cabinet into effective and non-effective members, or members "with the circulation of papers and without," the former of whom alone had access to confidential communications. With the downfall of Lord North's Ministry in 1782 the development of the modern Cabinet makes new progress. The members of the Rockingham Cabinet which succeeded were of one political party, and came into office together, with the exception of Lord Thurlow, who remained to watch their proceedings on behalf of the king. The long ascendancy of the younger Pitt in the confidence of the Crown and of the House of Commons (1784-1801), resulted in a fuller recognition of the essential rules which relate to the Cabinet and the office of Prime Minister. In 1803 Pitt, in declining to accept a subordinate office in the Addington Ministry, referred to the "absolute necessity that there should be an avowed and real minister possessing the chief weight in council and the principal place in the confidence of the king." About the same time, Lord Loughborough's enforced exclusion from the Cabinet, after he had resigned the seals, put an end to the existence of non-effective members of the Cabinet. About the same time, the names of the members comprising the Cabinet first became generally known to the public. The constitutional crisis of 1807 established the rules that the Crown must not attempt to fetter its advisers by pledges as to their future action, and that when ministers are dismissed by the Crown, their successors must accept responsibility for their dismissal. About the same time the right of the Prime Minister to choose his own colleagues obtained recognition. In the reign of George IV. it was settled that the Crown may not inquire into the lines of division in the Cabinet; and the king's surrender on the question of Roman Catholic Emancipation, as Mr. Gladstone has pointed out, marked the downfall of the system of personal government, which made the wishes of the Sovereign prevail against the advice of ministers responsible to Parliament. With regard to the last measure, it is curious to note that the proposal to exclude members of that religion from the office of Prime Minister was defeated by the argument that it would be of dangerous consequence to recognise even the existence of such an office in an Act of Parliament. The action of William IV. in dismissing the Melbourne Cabinet has been already dealt with, and the Bed-chamber question of 1839, though it kept Peel out of office for two years, scarcely attained the dignity of a constitutional crisis. Much more important was the resolution of the Commons in 1841 that the Whig Ministry had not the confidence of the House, and "that their continuance in office, under such circumstances, was at variance with the spirit of the constitution." This was the first formal recognition that the Cabinet depends upon the support of a majority in the House of Commons for its continuance in office. But there has since been a further development. At a general election, the power of retaining or dismissing a ministry passes for the time being from the House of Commons to the constituencies themselves; and in several recent instances ministers defeated at the polls have not waited to resign until the House of Commons had formally registered the verdict of the electors. The increased control over the time and business of the House of Commons, and the increasing tendency to work through committees of the Cabinet, are the most marked developments of Cabinet government in recent years.

[Gladstone, *Gleanings from Past Years*; Todd, *Parliamentary Govern-*

*ment in England*, edited by Spencer Walpole, which contains the fullest collection of Cabinet precedents; Anson, *Law and Custom of the Constitution*; Bagehot, *English Constitution*; Morley, *Walpole*.]

**Cable.**—Chain cables have been specially dealt with by statute in the Chain Cables Acts, 1864 to 1874, which provide that cables to be used in British ships must pass a test fixed by the Board of Trade, and must be tested and stamped by properly qualified persons; and to sell or buy any chain cable for the use of a British ship without having been so tested and stamped, is a misdemeanour; and every contract for the sale of a chain cable is held to imply a warranty that it has been properly tested and stamped. It has been decided that this last provision is not limited by the one which precedes it, and that the warranty is implied whether the cable be bought for the use of a British or a foreign ship (*Hall v. Billingham*, 1885, 5 Asp. 538). A cable, or any other like article, exceeding five fathoms in length, may not be cut up or unlaidd by a marine store dealer, under penalty, without a written permit; and to obtain this the latter must make a declaration before a justice of the peace having jurisdiction where he resides, stating the quality and description of the cable, the name and description of the person from whom he obtained it, and that he has acquired it honestly and believing its possessor had an honest title to it. He can then obtain the permit, either from the magistrate or the receiver of the district; but cannot act upon it till he has advertised the fact of such permit being given him, under penalty (M. S. A., 1894, s. 541). And see ANCHOR.

**Cables, Submarine.**—International joint action in connection with telegraphic communication dates back to 1869, when an International Telegraphic Union (see TELEGRAPH) was formed. Subsequent international conferences dealt with the same subject in 1868, 1871, 1875, and 1879, but always exclusively with telegraphic communication by land. A movement was set on foot in 1879 by the Institute of International Law (*q.v.*) for a union of the different powers concerned to protect submarine cables against destruction or deterioration on the high seas. The articles drawn up by the Institute led to an official international conference, which resulted in the Submarine Telegraphs Convention (March 14, 1884). Under this Convention, which "applies outside territorial waters to all legally established submarine cables landed on the territories, colonies, or possessions of one or more of the high contracting parties" (art. 1), "it is a punishable offence to break or injure a submarine cable wilfully or by culpable negligence in such manner as might interrupt or obstruct telegraphic communication either wholly or partially, such punishment being without prejudice to any civil action for damages" (art. 2).

The other chief provisions of the Convention are that—

"Vessels engaged in laying or repairing submarine cables shall conform to the regulations as to signals which have been, or may be, adopted by mutual agreement among the high contracting parties, with the view of preventing collisions at sea. When a ship engaged in repairing a cable exhibits the said signals, other vessels which see them or are able to see them shall withdraw to or keep beyond a distance of one nautical mile at least from the ship in question, so as not to interfere with her operations" (art. 5). "Owners of ships or vessels who can prove that they have

sacrificed an anchor, or net, or other fishing gear in order to avoid injuring a submarine cable shall receive compensation from the owner of the cable"; and "in order to establish a claim to such compensation, a statement, supported by the evidence of the crew, should, whenever possible, be drawn up immediately after the occurrence, and the master must within twenty-four hours after his return to or next putting into port make a declaration to the proper authorities" (art. 7). "The tribunals competent to take cognisance of infractions of the present Convention are those of the country to which the vessel on board of which the offence was committed belongs" (art. 8). By art. 15 it is provided that the stipulations of the Convention do not in any way restrict the action of belligerents (*q.v.*). It may be remarked that the British representative at the time of signing the Convention declared that his Government understood that in time of war a belligerent would be free to act in regard to submarine cables as though the Convention did not exist.

The Act to carry into effect the above Convention is the Submarine Telegraph Act, 1885, 48 & 49 Vict. c. 49, which was slightly modified by 50 Vict. c. 3. Sec. 3, of the earlier Act provides that a person who injures the cable either wilfully or by culpable negligence is "guilty of a misdemeanour, and on conviction—(a) if he acted wilfully, shall be liable to penal servitude for a term not exceeding five years, or to imprisonment with or without hard labour for a term not exceeding two years, and to a fine either in lieu of or in addition to such penal servitude or imprisonment; and (b) if he acted by culpable negligence shall be liable to imprisonment for a term not exceeding three months without hard labour, and to a fine not exceeding £100 either in lieu of or in addition to such imprisonment."

See Board of Trade Correspondence on Protection of Submarine Cables, July 24, 1882; and Parliamentary Papers [C. 5910], 1890.

**Cairns' Act.**—The Act commonly known by this name is the Act 21 & 22 Vict. c. 27, of which the proper short title was "The Chancery Amendment Act, 1858." It was repealed by the Statute Law Revision and Civil Procedure Act, 1883, 46 & 47 Vict. c. 49 (except so far as it related to the Court of the county palatine of Lancaster, *ibid.* s. 7), but, as is customary in repeals by such Acts, any jurisdiction, principle or rule of law or equity established by the repealed Act was not affected by its repeal (*ibid.* s. 4); and notwithstanding its total repeal in 1883 some words and sections of the Act (not affecting anything referred to in this article) were separately repealed by the Statute Law Revision Act, 1892.

Cairns' Act for the first time empowered the Court of Chancery to award relief by way of damages, and it is still of importance because, although its provisions are now replaced by the general provision in the Judicature Acts (Judicature Act, 1873, ss. 16, 24), that each branch of the High Court of Justice is to have jurisdiction to award full relief in every matter which comes before it, the Act laid down a rule that damages may be given in lieu of what was formerly the appropriate equitable relief, and such rule remains in force (*Fritz v. Hobson*, 1880, 14 Ch. D. 542). The material section of the Act is sec. 2, which provided that "in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the

same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct."

It was held that the damages awarded under the Act were to be awarded once for all as compensation, and in substitution for the right in respect of the infringement of which they were given (*Stokes v. City Offices Co.*, 1865, 13 L. T. N. S. 81, per Cranworth, L. C.; *Fritz v. Hobson*, 1880, 14 Ch. D. at pp. 548 and 557).

On the other hand, the Act and the rule established under it do not alter the settled principles upon which Courts of equity acted in awarding injunctions or specific performance so as to give the Court an unlimited discretion to award damages in lieu of the one or the other in every case (*Shelfer v. City of London Electric Lighting Co.* [1895], 1 Ch. 287, C. A.; the defendants' appeal to the House of Lords was abandoned [1895], 2 Ch. 388). In the last cited case the jurisdiction to give damages in lieu of an injunction established by the Act was much debated. The defendants had occasioned a nuisance to the premises of the plaintiffs by noise and vibration, and Kekewich, J., refused to grant an injunction to restrain the continuance of the nuisance, but ordered the defendants to pay damages in lieu of it. On appeal by the plaintiffs, it was contended on their behalf that the jurisdiction to give damages in lieu of an injunction existed only where either the plaintiff had disentitled himself to an injunction by *laches* (see *ante*, vol. i. p. 95), or where a mandatory injunction was in question, and on behalf of the defendants that the discretion of the Court was unlimited. Both of these contentions were rejected by the Court of Appeal. Lindley, L. J., said that even since the Act was passed the Court had repudiated the notion that the Legislature intended to turn the Court into a tribunal for legalising wrongful acts, or that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may do. The Court held accordingly that the jurisdiction to award damages in lieu of an injunction existed only in exceptional cases where the grant of an injunction would be vexatious, or where the conduct of the plaintiff had disentitled him to that form of relief (see per Lindley, L. J., at p. 317). Smith, L. J., said that a good working rule to distinguish the exceptional cases referred to was that in such cases there are found in combination the four following requirements, namely, an injury to the plaintiff's legal rights which is small, is capable of estimation in money, and of adequate compensation by a small payment, and circumstances making the grant of an injunction oppressive.

A question has been raised whether under the Act the Court has any jurisdiction at all to refuse an injunction, giving damages in lieu of it, where the wrong complained of is an injury to a legal right which is threatened but not yet committed. For example, in a case where the defendant proposes to build so as to obstruct ancient lights. It is settled by the case last cited, and by *Martin v. Price* [1894], 1 Ch. 276, that the plaintiff has a right *ex debito justitiæ* to the injunction if the threatened interference would be serious. In *Dreyfus v. Peruvian Guano Co.*, 1889, 43 Ch. D. at pp. 333 and 342, the lords justices expressed an opinion that, where the injury is threatened only, there is no jurisdiction to force the plaintiff to accept damages. On the other hand, in an earlier case (*Holland v. Worley*, 1884, 26 Ch. D. 578) Pearson, J., decided that he had such jurisdiction, and actually exercised it, giving the sum of £150 in respect of the threatened damage to a house of the estimated value of

£1000. In *Martin v. Price* (*supra*), where all the cases on the subject are cited, the Court of Appeal refused to decide the general question.

Damages may, it has been suggested, be awarded under the Act in some cases where they could not have been recovered at law, for instance, in the case of the breach of a restrictive covenant which is equitably but not legally binding upon the defendant (*Eastwood v. Lever*, 1863, 4 De G., J. & S. 114, see the judgment of Turner, L. J.)

See DAMAGES; and Kerly, *Hist. of Equity*.

**Calculated to Benefit.**—If the Court is of opinion that a proposal for a composition or scheme of arrangement offered by a debtor in bankruptcy is not calculated to benefit the general body of the creditors, it is directed to refuse to approve the proposal (Bankruptcy Act, 1890, s. 3 (8)). This replaces sec. 18 of the Act of 1883, which was to the same effect. The earlier Act (1869, s. 126) gave a majority of the creditors much wider powers to substitute a composition for bankruptcy than the creditors now have. The only limitation provided was that “if it appears to the Court on satisfactory evidence that a composition under this section” (s. 126) “cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the Court may adjudge the debtor a bankrupt.” The other section of the Act of 1869 dealing with compositions (s. 28) made them subject to the approval of the Court without specifying any limitation.

Upon the Act of 1869, it was held that in approving a scheme for a composition, the majority of creditors must act *bona fide* for the benefit of the creditors, and not for the benefit of, or out of kindness to, the debtor (*In re Russel*, 1875, L. R. 10 Ch. 255), or for their own individual advantages (per Jessel, M. R., *Ex parte Merchant Banking Co.*, 1881, 16 Ch. D. at p. 641). So where there were practically no assets, and the majority of the creditors really intended to release the debtor, the Court would not register their resolutions (*In re Russel*, *supra*).

The same rule is adopted in applying the present Act. The Court has to protect creditors against themselves (*In re Reed & Bowen*, 1886, 17 Q. B. D. 244; *In re Burr* [1892], 2 Q. B. at p. 473), and will not be blindly influenced by their resolutions in favour of the scheme (*l.c.*), or by the report of the official referee approving it (*In re Browne & Wingrove*, 1890, W. N. 131). Where a scheme offers nothing more to the creditors than they will get in bankruptcy, and deprives them of some of the powers of the Court, it is not calculated to benefit them (*In re Aylmer*, 1887, 19 Q. B. D. 33). In the last-cited case it was urged that the diminished cost of administration under the scheme would produce a benefit, but upon this application, and upon a later application in the same bankruptcy (*In re Aylmer*, 1887, 20 Q. B. D. 258) the debtor's proposal was rejected by the Court. In the first instance it had been proposed, in this case, to give the trustee the powers relating to discovery aforesaid (Act of 1883, s. 27), in the second to allow the trustee to enter up judgment against the debtor (*ibid.* s. 28 (6)). The Court held that neither of the sections cited could be made to apply under a composition.

See BANKRUPTCY in vol. i. at p. 524.

**Calculated to Deceive.**—It is provided by the Patents, Designs, and Trade Marks Acts that, except where the Court has decided

that two or more persons are entitled to be registered as proprietors of the same trade mark (Act of 1883, s. 71), there shall not be entered upon the register of trade marks a trade mark having such resemblance to a trade mark already on the register with respect to the same goods or description of goods as to be calculated to deceive (Act of 1883, s. 72 (2), as amended by Act of 1888, s. 14, following Act of 1875, s. 6). The test of too near resemblance is the same as that which determines in an action for infringement whether the defendant's is an infringement of the plaintiff's mark; but the degree of probability of deception is not necessarily the same, for the Comptroller may properly refuse to register a new mark as too nearly resembling an existing registered mark, although it might not be held to be an actual infringement of it (*Speer's case*, 1887, 4 R. P. C. at p. 524; *Eno v. Dunn*, 1890, 15 App. Cas. 252).

A. *To Deceive Whom?*—The persons to be considered are not merely retailers or dealers, but also and principally the probable ultimate purchasers, if the trade mark in question will reach them (*Ford v. Foster*, 1872, L. R. 7 Ch. 611; *Lever v. Goodwin*, 1887, 36 C. D. 1), and careless or unwary persons, as well as those who are careful and intelligent (*Wotherspoon v. Currie*, 1872, L. R. 5 H. L. 508, per Lord Chelmsford; *Singer Manufacturing Co. v. Loog*, 1882, 18 Ch. D. at p. 413; 8 App. Cas. at p. 42).

B. *Rules of Comparison*.—No definite rule as to the amount of resemblance which is calculated to deceive can be formulated. The judge's eye must usually be the ultimate test, although expert evidence is admissible, notwithstanding that it is frequently the occasion of judicial protests (*Turton v. Turton*, 1889, 42 Ch. D. at p. 149, per Fry, L. J.; *In re Jelley*, 1878, 51 L. J. 639 n.). But the following working rules of comparison are deducible from the cases (see Kerly's *Trade Marks*, pp. 186 and 319):—

1. The main ideas left on the mind by each of the marks must be contrasted (*Johnson v. Orr-Ewing*, 1882, 7 App. Cas. 219; *Christiansen's Tm.*, 1886, 3 R. P. C. 54), special attention being directed to the essential features of the marks claimed as such in the application to register (*Murphy's Tm.*, 1890, 7 R. P. C. 163; Act of 1888, s. 10 (2)).

2. If the mark which the mark in question is said to too closely resemble has suggested a name by which the goods of its proprietor have become known, the circumstance that the latter mark is likely to suggest the same or a similar name will generally constitute a resemblance calculated to deceive (*Anglo-Swiss Condensed Milk Co. v. Metcalf*, 1886, 31 Ch. D. 454, "Milkmaid Brand"; *Société des Verreries de l'Etoile's Tm.* [1894], 1 Ch. 61, "Star Glass"), unless the name is merely descriptive of the goods (see *Barlow v. Johnson*, 1890, 7 R. P. C. 395), or is common to the trade (*In re Dexter's Application* [1893], 2 Ch. 262; *Wilkinson v. Griffith* [1891], 8 R. P. C. 370).

3. The marks must be compared as fairly and honestly (*Lyndon's Tm.*, 1885, 32 C. D. 109; *Kutnow's Tm.* [1893], 10 R. P. C. 401) used upon the goods in actual practice (*Lambert's Tm.*, 1889, 5 R. P. C. 542; 6 R. P. C. 344; *Lyndon's Tm.*, 1885, 32 Ch. D. 109). For instance, they may be used so deeply coloured as to obscure some details (*Worthington's case*, 1879, 14 Ch. D. 8), though colour is not usually of much importance (*Nuthall v. Vining*, 1880, 28 W. R. 330), or with blank spaces filled up (*Christiansen's Tm.*, 1886, 3 R. P. C. 54).

4. All the circumstances of the trade and market and of the user of the marks must be considered. For instance, words which would constitute a sufficient distinction in a home-market may be useless abroad (*Wilkinson v. Griffith* [1891], 8 R. P. C. 370); on the other hand, an apparently fine distinc-

tion may be of a kind readily appreciated by the trade (*Mitchell v. Henry*, 15 Ch. D. at p. 194, per Jessel, M. R.).

5. The addition to a mark, which is otherwise so like the mark with which it is compared as to be calculated to deceive, of inconspicuous distinctions or cautions, is immaterial. So the use of the defendant's name has in many cases been held not to prevent his mark being deceptive (*Wotherspoon v. Currie*, 1872, L. R. 5 H. L. 508). A total difference in the "get up" of the goods has sometimes decided a doubtful case of infringement in favour of the defendant, but it is disregarded if the deceptive resemblance is clear (*Apollinaris Co. v. Hersfeldt*, 1887, 4 R. P. C. 478).

**Calendar.**—The calendar in England is regulated by the Style Act, 24 Geo. II. c. 23 (recently dubbed the Calendar (New Style) Act, 1750), and the Calendar Act, 1751, 25 Geo. II. c. 30, which substituted the Gregorian Calendar, or New Style, for the Julian Calendar, or Old Style, still in use in countries where the Orthodox Church predominates. The Acts apply to the whole of the Queen's dominions. The term calendar month is used with reference to these Acts, and is now the statutory meaning of the term month (Interpretation Act, 1889, 52 & 53 Vict. c. 63, s. 3). As to the mode of computing a calendar month, see *Radcliffe v. Bartholomew* [1892], 1 Q. B. 161.

**Calendar of Prisoners.**—At the sittings of any Court under a commission of gaol delivery, oyer and terminer, or of the peace for the trial of indictments, it was the duty of the sheriff or bailiff for the county, borough, or franchise for which the Court was held, to provide the judges with a certified list of all prisoners in his custody for trial for felony, to have the names calendared for trial. This obligation rested on an Act of 1487 (3 Hen. VII. c. 3), which provides a penalty of 100s. for default. Under the present law as to PRISONS, the custody of criminal prisoners, except persons under sentence of death, has in substance passed to the governors of the prisons.

Under the Prisons Act, 1835, 5 & 6 Will. IV. c. 38, s. 3, gaolers and keepers of prisons near the place where assizes or sessions were held were required to deliver a calendar of prisoners in their custody, and under the Criminal Justice Administration Act, 1851, 14 & 15 Vict. c. 55, s. 19, a like duty was imposed on the gaolers of the prisons of counties, of cities, or towns, with respect to borough prisoners in their custody triable before the judges of assize of the next adjoining county owing to the non-issue of a borough commission of assize, etc.

Under the Prisons Act, 1865, 28 & 29 Vict. c. 126, s. 62, the obligations of the sheriff as to calendars were transferred to the gaolers, who are required to deliver and cause to be delivered to the judges of assize and the justices in Quarter Sessions a calendar of all prisoners in custody for trial at such assizes or gaol sessions, in the same way as a sheriff had been required to do in the case of prisoners committed to the common gaol of a county; and the sheriff is expressly released from his obligation without express repeal of the Act of 1487. The transfer to the Crown of all gaols by the Prison Act, 1877, has released all bailiffs of franchises and like officers from obligation as to calendar.

The Winter and Spring Assizes Acts, 39 & 40 Vict. c. 57; 40 & 41 Vict. c. 46; and 42 & 43 Vict. c. 1, and the Orders in Council made there-



under, modify the duties of gaolers as to calendars for counties combined for a particular assize. In practice it is usual to include in the calendar, which is printed, not only the prisoners in custody, but also the persons committed for trial but admitted to bail, and to specify the nature of the charges to be preferred, the date of the committal, and the committing magistrate.

The assize calendar does not include prisoners in custody for trial at Quarter Sessions. This does not affect the jurisdiction of the judges of assize to deliver the gaol if they choose. But see the Assizes Relief Act, 1889, 52 & 53 Vict. c. 12.

### **Calls on Shares.**—See COMPANY.

**Camera, in.**—1. This term seems to have been originally applied to the judges' chambers at Serjeants' Inn, as distinguished from their bench in Westminster Hall. It is now used with reference to legal proceedings held privately (*in camerâ*, in chambers), from which the public are excluded.

As a general rule, all trials of an issue of fact in England have always been held with open doors. Under the mediæval procedure, all suitors of a Court were summoned to attend its sittings, and bound under penalty to be there to witness or arrest in the proceedings. Trials were *in pais*, and differed, for this and other historic reasons, from trials under the civil and canon law, which rested on inquisition and torture, and were usually conducted in private; and, notwithstanding all changes in procedure, an English Court of justice is in theory open to as many citizens as can crowd into it without disturbing its proceedings.

2. Criminal cases, whether tried summarily or on indictment, must be heard in open Court (see 11 & 12 Vict. c. 43, s. 20; 42 & 43 Vict. c. 49, s. 20 (1) as to summary cases). A preliminary inquiry into an indictable offence was not, under 11 & 12 Vict. c. 42, s. 19, heard in open Court. An opinion was given in 1884 by the law officers that this enactment was superseded by the Summary Jurisdiction Act, 1879, and the definition of Court of Summary Jurisdiction contained then in sec. 7 of the Summary Jurisdiction Act, 1884, and now in sec. 13 (11) of the Interpretation Act, 1889, 52 & 53 Vict. c. 63 (see Gill and Douglas, *Summary Jurisdiction Acts*, pp. 217, 351); but the Statute Law Committee have not thus far ventured to include s. 19 in a Statute Law Revision Bill.

It is a common practice to order women and children out of Court when certain classes of criminal charges are being heard; but the order as to adult women has neither common law nor statutory authority, and is unenforceable by any lawful process. Legislation has for some years been proposed on this subject.

3. *Queen's Bench.*—In civil proceedings on the common law side there seems to have been no precedent until 1889 for exclusion of the public from a trial with or without a jury, whether the parties consented or not. In *Malan v. Young*, 1889, 6 T. L. R. 38, the public, including barristers not concerned in the case, were excluded, by order of the judge and consent of the parties on a trial for libel held without a jury. The power of the judge was at the time strongly questioned (see 34 Sol. J. 41; 24 L. J. N. 647; 88 L. T. J. 40).

4. *Chancery.*—In the Court of Chancery it was long the practice to take *in camerâ*, with or without consent, matters affecting wards of Court (see

*In re Martindale* [1894], 3 Ch. 193) and lunatics (*Ogle v. Brandling*, 1831, 2 Russ. & M. 688); and, by consent, family disputes (*In re Lord Portsmouth*, 1815; Coop. temp. Eld. 106). For the practice in lunacy proceedings, see LUNACY. In *Andrew v. Raeburn*, 1874, L. R. 9 Ch. 522, the Lords Justices raised the question whether the Court could not hear in private, without consent, a cause in which publicity would defeat the object of a suit. In the particular case the object of the suit was to restrain publication of private letters, and was attained without necessity of a private hearing. In *Nagle-Gillman v. Christopher*, 1876, 4 Ch. D. 173, this dictum was accepted as the law, and in *Badische Anilin und Soda Fabrik v. Gillman*, 1883, 24 Ch. D. 156, it was applied to evidence as to a secret trade process which was taken *in camera*, and the shorthand notes impounded; and in *Mellor v. Thompson*, 1885, 31 Ch. D. 55, to an action to restrain a solicitor from disclosing matters confided to him as such, and the Court of Appeal held itself entitled to hear such a case *in camera*.

All these decisions are primarily applicable to matters attached to the Chancery Division of the High Court, and all rest on usage or convenience, and not on statutory enactment.

5. *Matrimonial Causes*.—Under the ecclesiastical practice certain classes of matrimonial suits could be heard *in camera*. Under the Matrimonial Causes Act, 1857, petitions for dissolution of marriage must be heard in open Court (*Barnett v. Barnett*, 1859, 29 L. J. Mat. 28; *H. v. C.*, 1859, 29 L. J. Mat. 29; *C. v. C.*, 1869, L. R. 1 P. & D. 640). But after considerable hesitation it is now held, on sec. 22 of the Act of 1857, that nullity cases can be taken *in camera* (*A. v. A.*, 1875, L. R. 3 P. & D. 230). Where divorce is sought on the ground of sodomy, the evidence is in practice taken in private. In *Cohen v. Cohen*, 3 March 1897, Sir F. Jeune held that such a case could not be heard *in camera*, but requested all persons not interested, *i.e.* concerned, in the case to leave the body and gallery of the Court, after which the trial proceeded with closed doors.

6. *High Court*.—Under the Rules of the Supreme Court of 1883, Order 37, r. 1, in the absence of an agreement in writing between the solicitors of all parties, and subject to the rules, the witnesses at the trial of an action or assessment of damages must be heard *vidē voce* and in open Court. This provision was directed against the old Chancery practice of trying on affidavit, and had not in view the question of trial with closed doors. Interlocutory proceedings in chambers (*q.v.*) under the Judicature Acts and Rules, while not open to the public, are not *in camera* in the ordinary meaning of the term. The authority to keep the public out appears to flow from the purposes for which these proceedings are authorised.

7. Where proceedings are directed to be held *in camera*, it seems to be a contempt of Court to publish a report of them, except, perhaps, of the result (*In re Martindale* [1894], 3 Ch. 193). The power of a Court to prohibit reports of its proceedings is said to exist at common law, but has not recently been exercised.

**Campbell's (Lord) Act (Accidents).**—Prior to Lord Campbell's Act, 1846, 9 & 10 Vict. c. 93, there was no civil remedy at all for a personal injury causing death, in accordance with the maxim *actio personalis moritur cum persona* (*q.v.*).

The statute, which is entitled "an Act for compensating the families of persons killed by accidents," after reciting that no action at law is now

maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person, and that it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him, enacts that: "Whosoever the death of a person should be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony" (s. 1). See *Higgins v. Butcher*, 1606, Yelv. 89; *Baker v. Bolton*, 1808, 1 Camp. 493; 10 R. R. 734; *White v. Spettigue*, 1845, 13 Mee. & W. 603; *Midland Insurance Co. v. Smith*, 1881, 6 Q. B. D. 561.

The right of action is not for the benefit of the personal estate, but is conferred for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused (s. 2).

The action is brought by and in the name of the executor or administrator of the deceased (s. 2); but if there is no personal representative of the person whose death has been caused, or if no action is brought by personal representatives within six months, all or any of the persons on whose behalf the right of action is given may sue in their own names (Amending Act of 1864, 27 & 28 Vict. c. 95, s. 1).

The jury may give such damages as they think proportioned to the injury resulting from the death to the parties respectively for whose benefit the action is brought, and the amount so recovered, after deducting the costs not recovered from the defendant, is divided amongst the parties in such shares as the jury by their verdict find and direct (s. 2).

But in the event of the defendant paying money into Court, he may pay it as a compensation in one sum to all persons entitled, without specifying the shares into which it is to be divided by the jury; where such sum is not accepted, and an issue is taken by the plaintiff as to its sufficiency, and the jury thinks the same sufficient, the defendant is entitled to a verdict (Amending Act, s. 2).

Only one action lies in respect of the same subject-matter of complaint, and every action must be commenced within twelve months after the death of the deceased (s. 3).

*Particulars of Claim.*—The plaintiff on the record is required, together with the statement of claim, to deliver to the defendant or his solicitor full particulars of the person or persons for whose benefit the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered (s. 4).

*Construction of Terms.*—"Person" applies to bodies politic and corporate. "Parent" includes father and mother, grandfather and grandmother, stepfather and stepmother. "Child" includes son and daughter, grandson and granddaughter, stepson and stepdaughter (s. 5). "Child" does not include an illegitimate child (*Dickinson v. North-Eastern Ry. Co.*, 1863, 2 H. & C. 735; 33 L. J. Ex. 91), but includes, it is conceived, a child *en ventre sa mère* (*The George and Richard*, 1871, L. R. 3 Ad. & Ec. 466). In two Scotch cases the House of Lords has held that the mother of a bastard child cannot maintain an action (*Clarke v. The Carfin Coal Co.* [1891], App. Cas. 412; *Wood v. Gray & Sons* [1892], App. Cas. 576).

A wife living in adultery cannot recover under the Act (*Stimson v. Wood*, 1888, 36 W. R. 734).

*Nature of the Cause of Action.*—The Act gives a new cause of action, "and does not merely remove the operation of the maxim *actio personalis moritur cum persona*, because the action is given in substance not to the person representing in point of estate the deceased man who would naturally represent him as to all his own rights of action which could survive, but to his wife and children no doubt suing in point of form in the name of his executor" (per Lord Selborne in *Seward v. The Vera Cruz*, 10 App. Cas. 59).

*Action for "Damage to the Estate."*—The provision for compensation made by Lord Campbell's Act does not take away any right of action open to the personal representative at common law. Accordingly an action for damage to the personal estate may be brought by the executor, although in an action under the Act, as plaintiff, on behalf of deceased's family, he may have recovered damages for injury caused by the death. Where a passenger on a railway was injured by an accident, and, after an interval, died in consequence, it was held that his executrix might recover, in an action for breach of contract against the railway company, the damage to his personal estate arising in his lifetime from medical expences and loss occasioned by his inability to attend to business (*Bradshaw v. Lancashire and Yorkshire Ry. Co.*, 1875, L. R. 10 C. P. 189).

"The intention of the Act was to give the personal representative a right to recover compensation as a trustee for children or other relatives left in a worse pecuniary position by reason of the injured person's death, not to affect any existing right belonging to the personal estate in general. There is no reason why the statute should interfere with any right of action an executor would have had at common law. In the case of such right of action, he sues as legal owner of the general personal estate which has descended to him in course of law; under the Act, he sues as trustee in respect of a different right altogether on behalf of particular persons designated in the Act" (per Grove, J., S. C., *Brunsdon v. Humphrey*, 1884, L. R. 14 Q. B. D. 141; see also *Leggott v. G. N. Ry. Co.*, 1876, L. R. 1 Q. B. D. 599; *Potter v. Metropolitan District Ry. Co.*, 1874, 30 L. T. N. S. 765).

*Damages.*—The measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to the family, so that a jury in assessing damages cannot take into consideration the mental sufferings of the plaintiff in respect of bereavement (*Blake v. Midland Ry. Co.*, 1852, 18 Q. B. 93).

It is not necessary that the pecuniary loss which accrues to the plaintiff from the death in respect of which he sues should arise from an actual legal obligation; it is sufficient to show a reasonable expectation of pecuniary benefit (*Franklin v. South-Eastern Ry. Co.*, 1858, 3 H. & N. 211).

Where a grown-up son was in the habit of giving his parents pecuniary and other assistance, the circumstance was held to be evidence of such reasonable expectation (*Hetherington v. North-Eastern Ry. Co.*, 1882, 9 Q. B. D. 160; *Dalton v. South-Eastern Ry. Co.*, 1858, 4 C. B. N. S. 296).

Damages cannot be recovered in respect of funeral and mourning expenses.

"The subject-matter of the statute is compensation for injury by reason of the relative not being alive, and there is no language in the statute referring to the cost of the ceremonial of respect paid to the memory of the deceased in his funeral, or in putting on mourning for his loss" (*Dalton v. S.-E. Ry. Co.*, *supra*).

As to what is Reasonable Expectation, see *Duckworth v. Johnson*, 1859, 4 H. & N. 653; and *Pym v. G. N. Ry. Co.*, 1862, 2 B. & S. 759.

*How the Pecuniary Loss is to be Calculated.*—See *Rowley v. London and N.-W. Ry. Co.*, 1873, L. R. 8 Ex. 221; *Phillips v. London and S.-W. Ry. Co.*, 1879, 5 C. P. D. 280, and 5 Q. B. D. 78; and *Livingstone v. Ranvards Coal Co.*, 1880, 5 App. Cas. 25.

No action can be maintained under the Act unless the plaintiff proves actual damage (*Duckworth v. Johnson, supra*). The damages must be special damages, and the action cannot be supported to recover merely nominal damages (*Boulter v. Webster*, 1865, 11 L. T. N. S. 598).

*Apportionment of Damages, etc.*—Where an action, brought by the personal representative for the benefit of himself and another, has been compromised under 27 & 28 Vict. c. 95, by the payment of a lump sum of money without any apportionment by a jury of the amount of damages payable to the plaintiff in respect of his interest, and the plaintiff retains the whole sum to his own use, no action at law is maintainable at the instance of the other party to obtain apportionment. He may obtain apportionment, however, under such circumstances in a Court of equity where a decree may be obtained to compel the nominal plaintiff in the action under the Act as trustee to administer the trust (*Condiliff v. Condiliff*, 1874, 29 L. T. N. S. 831). As to whether the action would or would not lie if apportionment had taken place, the Court refrained from expressing an opinion (S. C.).

In *Bulmer v. Bulmer*, 1883, 25 Ch. D. 409, it was held that where the executors of a deceased person have compromised a claim without bringing an action under the Act, the Court will apportion the fund in proceedings taken for that purpose in the Chancery Division. The apportionment, however, must be made on the same principle as it would have been if the matter had been before a jury.

In the absence of an agreement, money paid into Court may be treated as the personal estate of the deceased, and a division made such as would take place under the operation of the Statute of Distributions (*Sanderson v. Sanderson*, 1877, 36 L. T. N. S. 847).

*Effect of Accord and Satisfaction during Lifetime of Deceased.*—Where deceased had in his lifetime been paid and had accepted a sum of money in full satisfaction and discharge of all claims and causes of action in respect of injuries received, it was held that his widow could not bring an action under the Act (*Read v. Great Eastern Ry. Co.*, 1868, L. R. 3 Q. B. 557). "The intention of the statute is not to make the wrongdoer pay damages twice for the same wrongful act." . . . "It only points to a case where the party injured has not recovered compensation against the wrongdoer" (per Lush, J., S. C.).

And so the personal representatives of a deceased man cannot maintain an action under the Act where the deceased, if he had survived, would not have been entitled to recover (*Haigh v. Royal Mail Steam Packet Co.*, 1883, 52 L. J. Q. B. 640).

*Effect of Contributory Negligence by Deceased.*—The rules in actions brought under the statute by representatives are the same as in actions brought by the injured parties themselves; therefore, if the deceased by his conduct leads to the accident, an action under the statute does not lie (*Tucker v. Chaplin*, 1848, 2 Car. & K. 730).

*Insurance Policies, how they affect Claims under the Act.*—At common law in an action for injuries caused by the defendant's negligence, a sum received by the plaintiff on an accident insurance (*q.v.*) policy cannot be taken into account in reduction of damages. He does not receive the money under the policy because of the accident, but because he has made a contract

for the contingency ; an accident must occur to entitle him to it, but it is not the accident but his contract which is the cause of his receiving it (*Bradburn v. Great Western Ry. Co.*, 1874, L. R. 10 Ex. 1).

In respect of claims, however, under Lord Campbell's Act, a different rule obtains, where, if the insurance is against accidents, the whole of such insurance falls to be deducted from the amount that may be assessed by the jury ; while, with regard to life policies, some deduction ought to be allowed as, say, the premiums that would be paid by the family or by himself if the fatal accident had not happened (*Hicks v. The Newport, Abergavenny, and Hereford Ry. Co.*, 1857, note, 4 B. & S. 403, approved in *Grand Trunk Ry. Co. of Canada v. Jennings*, 1888, 13 App. Cas. 800, where it is said the pecuniary benefit which accrued to the widow from her husband's premature death consisted in the accelerated receipt of a sum of money, the consideration for which had already been paid by him out of his earnings). In such a case the extent of the benefit may fairly be taken to be represented by the use or interest of the money during the period of acceleration : and it was upon that footing that Lord Campbell in *Hicks v. Newport Ry. Co.*, *supra*, suggested to the jury that, in estimating the widow's loss, the benefit which she derived from acceleration might be compensated by deducting from their estimate of the future earnings of the deceased the amount of the premiums, which, if he had lived, he would have had to pay out of his earnings for the maintenance of the policy. Under the Act, whatever comes into the possession of the family who have suffered by the death of their relative by reason of his death must be taken into account, for the damages recoverable are a compensation to the family of the deceased equivalent to the pecuniary benefits which they might have reasonably expected from the continuance of his life (*Bradburn v. Great Western Ry. Co.*, *supra* ; see Beven, 2nd ed., *Negligence in Law*, vol. i. pp. 233-235 ; Mayne on *Damages*, 5th ed., p. 516 ; Bunyon, *Law of Life Assurance*, 3rd ed., pp. 33 and 34). Sec. 35 of the Railway Passengers' Assurance Company's Act, 1864, 27 & 28 Vict. c. cxxv., provides that no contract of that company, nor any compensation received or recoverable by virtue of any such contract, shall prejudice or affect, *inter alia*, claims preferred under Lord Campbell's Act.

There has been considerable conflict of opinion as to whether the Admiralty Division can entertain an action *in rem* for damages for loss of life under the Act, but it is now settled that it cannot do so (*Seward v. Vera Cruz*, 1884, 10 App. Cas. 59, affirming the decision of the Court of Appeal ; *The Vera Cruz* (No. 2), 1884, 9 P. D. 96, overruling *The Franconia*, 1877, 2 P. D. 163). In *Seward v. Vera Cruz*, *supra*, the House of Lords held that the Admiralty Court Act, 1861, 24 Vict. c. 10, which by sec. 7 gave the Court of Admiralty "jurisdiction over any claim for damage done by any ship," did not give jurisdiction over claims for damages for loss of life under Lord Campbell's Act, and that the Admiralty Division could not entertain an action *in rem* for damages for loss of life under Lord Campbell's Act. Lord Selborne, however, observes : "Although it might have been possible to bring an ordinary action, in all respects of the same kind as could be brought in the Queen's Bench Division in the Probate, Divorce, and Admiralty Division, and though I should be far from entertaining any doubt as to the jurisdiction of that Division to deal with such an action in this as in any other case (but not more in this than in any other case), if no objection were taken and no transfer asked for or made, yet this is not an action of that kind. This is an action, brought in a form appropriate to actions *in rem* in the Admiralty Division, of the same kind as

might have been brought in the Court of Admiralty before the Judicature Acts were passed, and this question must be determined exactly in the same manner as if the action had been so brought, and as if the Judicature Acts had never been enacted."

And, moreover, the powers of the Court of Chancery under the Merchant Shipping Act, 1854, were conferred on the Admiralty Court by the Admiralty Court Act, 1861; so that whereas sec. 514 of the Merchant Shipping Act entitled a shipowner who had incurred liability in respect of loss of life, personal injury, or loss of or damage to ships' boats or goods, where several claims had been made in respect thereof, to commence a suit for the purpose of determining the amount of such liability, and for the distribution of the amount rateably amongst the several claimants, for the purposes of such section the Admiralty Division may inquire into damages to a deceased person. For a great many years the Court of Chancery had jurisdiction to limit the amount of the shipowner's liability, and, if there were several claimants against the ship, to divide the amount for which the shipowner was liable among them. In such a suit the liability was admitted. That jurisdiction has been given to the Admiralty Court. At the present time in such an action, if one of the claimants against the fund is a person "who sues under Lord Campbell's Act, it being necessary to distribute the fund according to statute, it may well be that the Chancery or Admiralty Division must do something not otherwise within its direct jurisdiction—it must take cognisance of such a claim in order to fulfil its regular jurisdiction" (per Lord Esher, M. R., *The Vera Cruz* (No. 2), *supra*, at p. 100).

[See Pollock on *The Law of Torts*, 4th ed., pp. 61–65; Beven, *Negligence in Law*, 2nd ed., Book I. ch. vi.; Campbell on *The Law of Negligence*, 2nd ed., p. 19.]

**Campbell's (Lord) Acts (Libel).**—There are two distinct Acts which are sometimes referred to by this title; we owe both of them to Lord Campbell. The first of these, the 6 & 7 Vict. c. 96, is an especially valuable measure. Its first two sections enable the defendant in an action of libel to prove that he made or offered to the plaintiff a full apology before action. (See APOLOGY.) Sec. 2 was amended by the 8 & 9 Vict. c. 75, and re-amended by the 42 & 43 Vict. c. 59, which repeals the provision as to paying money into Court. Sec. 3 deals with threats to publish a libel, and proposals to abstain from publishing a libel, made with intent to extort money; sec. 4 with the common-law crime of maliciously publishing a libel; and sec. 5 with a new statutory offence of publishing a libel, knowing it to be false—proof of such knowledge increasing the punishment. These three sections will be dealt with under the head of DEFAMATION. Sec. 6 enables a defendant in criminal proceedings for libel to plead that the words are true, and that it was for the public benefit that they should have been published. (See JUSTIFICATION.) Sec. 7 relieves a master or employer (*e.g.*, a newspaper proprietor) from criminal liability for a libel which was published without his authority, consent, or knowledge, and without any want of due care or caution on his part (see *R. v. Holbrook*, 1877, 3 Q. B. D. 60; 4 Q. B. D. 42). Sec. 8 deals with the costs of criminal proceedings for libel, and in particular with the costs occasioned by the defendant's pleading a justification under sec. 6.

The second Act (20 & 21 Vict. c. 83) was passed to more effectually prevent the sale of obscene books, pictures, prints, and other articles. It enables justices in certain cases to issue a warrant authorising their officer

to search for, seize, and bring before them obscene books, pictures, etc.; and then to serve a summons on their owner, on the hearing of which the justices may order such books, pictures, etc., to be destroyed. (See OBSCENE WORDS.)

**Camp-Fight.**—The fighting of two champions or combatants in the field (3 Co. Inst. 221), *i.e.* after order for trial by battle, or after challenge and deliberation, as distinguished from fighting in a brawl or chance medley (*q.v.*). This form of fighting in a private quarrel was forbidden by an edict of James I. in 1613 (Inner Temple Tracts, 11, K. 3), which purports to prohibit “all challenges to fight in the field, *i.e.* all single fights in the field after challenge in cold blood upon preparation and set match.” It was also prohibited by an ordinance of the Commonwealth in 1654 (c. 36), confirmed in 1656 (c. 10). See BATTLE; COURT OF CHIVALRY; CONSTABLE AND MARSHAL; DUEL.

**Can be.**—On the construction of the Statute 9 Geo. IV. c. 83, s. 24, which provides “that all laws and statutes in force within the realm of England at the time of the passing of this Act (not being inconsistent herewith . . .) shall be applied in the administration of justice in the Courts of New South Wales and Van Diemen’s Land respectively, so far as the same can be applied within the said colonies,” it was held in *Whirker v. Hume*, 1852, 21 L. J. Ch. 406, that the words “can be” meant “can reasonably be” applied; and this construction was approved by the Privy Council in *Jex v. McKinney*, 1889, 14 App. Cas. 77; Stroud, *Jud. Dict.*

**Canada.**—The Indian name given by the French settlers to the province of which the city of Quebec, founded in 1608, was the capital. Quebec was taken by General Wolfe in 1759, and the whole territory was ceded to Great Britain by the Treaty of Paris, 10 Feb. 1763. By the 14 Geo. III. c. 83, provision was made for the government of the province, and the English Criminal Law was introduced. Beyond the limits of the old province, the country was settled by immigrants from Great Britain. By the 31 Geo. III. c. 31, the two provinces of Upper and Lower Canada were constituted, each with a Legislative Council and Assembly. The Legislature of Upper Canada adopted the English law then in force as the basis of the institutions of that province. Disputes between the imperial and local authorities occurred in both provinces; in Lower Canada the troubles were so serious that the Legislature was suspended for a time by the 1 Vict. c. 9. On the report of Lord Durham, Parliament passed the Act 3 & 4 Vict. c. 35, by which the two provinces were united to form the province of Canada. The attempt to combine French-speaking Roman Catholics and English-speaking Protestants in one provincial legislature was not wholly successful; Canadian statesmen were wise enough to see that the solution of their difficulties lay in a federation of all the colonies in North America. On the basis of resolutions adopted by representatives of the colonies, the imperial Government framed the British North America Act, 1867, by which Her Majesty was empowered to declare that Canada, Nova Scotia, and New Brunswick should form one dominion under the name of Canada. The boundaries of the dominion have since been extended by the admission of new provinces; it now includes—



1. *Ontario or Upper Canada*.—As stated above, the laws of this province are English in their origin. The Legislature consists of the Lieutenant-Governor and a single chamber, called the Legislative Assembly. The Supreme Court of the province includes the Court of Appeal and the High Court (Q. B., C. P., and Chancery Divisions). The final appeal is to the Supreme Court of Canada, or to the Queen in Council (see the Ontario Statute, 53 Vict. c. 13).

2. *Quebec or Lower Canada*.—The edict of Louis XIV. (1663), which established the Conseil Supérieur and the courts of justice, directed that the custom of Paris should be the law of the province. For the sources of the French Canadian law, reference may be made to *Donegani v. Donegani*, 1833, 3 Kn. 63, and *Symes v. Cuvillier*, 1886, 5 App. Cas. 138. In 1855, seigniorial tenures of land were abolished. In 1867, a civil Code was promulgated, framed on the model of the French codes, but differing from them in many important particulars; this was followed by a code of Civil Procedure. The Legislature of Quebec consists of the Lieutenant-Governor, the Legislative Council, and the Legislative Assembly. The chief Courts of the province are the Court of Queen's Bench and the Superior Court. There is an appeal from the Courts of the province to the Supreme Court of Canada; in certain cases the appeal may be brought directly to the Queen in Council (see the rules of the Code of Civil Procedure, and Wotherspoon, *Manual of Practice*). Quebec is a bi-lingual province; both French and English are used in legal instruments and proceedings.

3. *Nova Scotia*.—A province first colonised by the French; ceded to Great Britain in 1714. It now includes the island of Cape Breton, which was at one time a separate colony. The French settlers having emigrated, the laws of the province are English in their origin. The Legislature consists of the Lieutenant-Governor, the Legislative Council, and the Legislative Assembly. From the Supreme Court there is an appeal to the Supreme Court of Canada, or to the Queen in Council, under the Order in Council of 20 March 1863.

4. *New Brunswick*.—A province which was at one time annexed to Nova Scotia; from 1785 to 1867 it was a separate colony. The Legislature consists of the Lieutenant-Governor and the House of Assembly. From the Supreme Court, appeals are taken to the Supreme Court of Canada, or to the Queen in Council, under the Order in Council of 27 Nov. 1852.

5. *Manitoba* was erected into a province by an Act of the Dominion Parliament, 33 Vict. c. 3. The Legislature consists of the Lieutenant-Governor and the Legislative Assembly. From the Court of Queen's Bench, appeals lie as from the Courts of the other provinces. See *Manitoba Statute*, 48 Vict. c. 48, and Order in Council, 10 March 1892.

6. *British Columbia* became a Crown colony in 1858, and was united with Vancouver Island in 1866. The Legislature is constituted as in Manitoba. From the Supreme Court, appeals lie as from the other provinces. Order in Council, 13 July 1887.

7. *Prince Edward Island* was formerly annexed to Nova Scotia; became a separate colony in 1770; was admitted into the Dominion in 1873. The Legislature is constituted as in Manitoba. From the Supreme Court, appeals lie as from the other provinces.

8. *The North-West Territories* were organised as a separate government by the Canadian Act, 38 Vict. c. 49, under a Lieutenant-Governor and a Legislative Assembly. There is also a Supreme Court, appeals from which are regulated by the Canadian Acts, 49 Vict. c. 25 and c. 50, and by Order in Council, 30 July 1891.

By Order in Council, 31 July 1880, all British possessions in North America, not previously included in the Dominion (except Newfoundland), were annexed thereto. By the B. N. A. Act, 1886, the Dominion Parliament was empowered to give representatives to territories not included in any province; the North-West Territories have now four representatives in the House of Commons.

Executive authority over the Dominion of Canada is exercised by a Governor-General, appointed by the Crown, on the advice of those members of the Canadian Privy Council who form the responsible Ministry for the time being. On the advice of his Ministers, the Governor-General appoints, and may remove, the Lieutenant-Governors of the provinces. See the case of M. Letellier, Todd, *Parliamentary Government in British Colonies*, 2nd ed., p. 601.

The Legislature of the Dominion consists of the Governor-General, the Senate (whose members are nominated for life by the Governor-General), and the House of Commons, in which the provinces are represented according to the number of their population. The distribution of legislative power between federal and provincial legislatures is effected by secs. 91, 92 of the B. N. A. Act, 1867. The powers given by the Act are, to some extent, concurrent; thus, for example, the Dominion Parliament may deal with the regulation of the liquor traffic as a matter concerning the good government of Canada; any general Act which it passes prevails over provincial legislation on the same subject; but, so far as the Dominion has not occupied the field, the provincial legislatures may deal with the matter as one which concerns the good government of each province. The provisions of the B. N. A. Act have frequently been discussed and interpreted by the judicial committee of the Privy Council. See Cartwright, *Cases on the B. N. A. Act*; Doutré, *Constitution of Canada*; Gerald J. Wheeler, *Confederation Law of Canada*.

The Courts of the Dominion are two in number. The Supreme Court of Canada was constituted by the Canadian Act, 38 Vict. c. 11. See also Rev. Stat. Can. c. 135, which provides that the judgment of this Court shall be final, saving any right which Her Majesty may exercise by virtue of her prerogative. In other words, appeals can only be brought to the Queen in Council by special leave. The Exchequer Court of Canada consists of one judge; it is a Court for Revenue cases, and is also a Colonial Court of Admiralty. There is an appeal from the Exchequer Court to the Supreme Court of Canada. The Supreme Court sits at Ottawa, where the Dominion Parliament also meets; the Exchequer Court may sit in any part of Canada. The local laws which regulate appeals to the Queen in Council are summarised by Mr. Gerald Wheeler in the work above cited. See PRIVY COUNCIL.

**Canal.**—The special rights and duties of the proprietors of a canal being defined by the private Act under which the canal has been constructed, reference must necessarily be made to such statute to ascertain what these are in the case of each canal. Here, it is only possible to briefly summarise the public statutes affecting canals in England.

Originally, canals in England were constructed with the view of making a profit to the proprietors out of the tolls levied in respect of the traffic passing upon them, and not with the object of enabling the proprietors to carry on the business of carriers; but, with the great spread of railway communication in the early years of the present reign, the Legislature, to

benefit the public by enabling canal companies to compete with the railway companies, conferred on the former, first, by the Canal Tolls Act, 1845, certain powers enabling them to vary their rates, tolls, and charges; and, secondly, by another statute of the same year, the Canal Carriers Act, 1845, the power to carry on the business of carriers, and for that purpose to provide such system of haulage—steam, animal, or other power—as they might think right; and to make reasonable charges for dealing with the goods conveyed by them. Power was further given to companies to contract with other canal companies for the interchange of traffic so as to avoid the necessity of a change of boats and delays arising from a diversity of interest. Tolls (which might be leased) were to be charged equally to all persons. This Act, while conferring these powers, did not, however, enable companies to raise the necessary moneys to take advantage of them; but this omission was remedied by the Canal (Carriers) Act, 1847, which enabled companies to borrow for this purpose on mortgage, in the manner or as nearly as possible in the manner prescribed by the Companies Clauses Consolidation Act, 1845, sums of money not exceeding at any one time one-tenth part, and not exceeding in the aggregate one-third part of the paid-up capital of the company.

The Railway and Canal Traffic Act, 1854, imposes the obligation on both railway and canal companies to make adequate provision for receiving and forwarding traffic without unreasonable delay, and without granting any undue preference to any person or company in connection therewith. Canal companies, too, in the same way as railway companies, having or working canals forming part of a continuous line of communication, or which have the terminus or wharf of the one within one mile of the terminus or wharf of the other (except termini or wharves within five miles of St. Paul's), are bound to afford due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such canals by the other (s. 2). Persons complaining that such facilities are not granted may apply to the Railway Commissioners (*q.v.*) for an order requiring them to be given (s. 3). By sec. 7 of the same Act, companies are made liable for loss occasioned by the neglect or default of their servants in the carriage of animals and goods, subject to the power of companies to make just and reasonable conditions in connection with the receiving, forwarding, and delivery of such traffic; and further subject to this, that no greater damages shall be recovered against a company for the loss of, or injury done to, any animals beyond the following sums, that is to say, for any horse, £50; for neat cattle, per head, £15; and for any sheep or pigs, per head, £2, unless a greater value has been declared by the sender.

To enable traders to ascertain the rates for the carriage of goods on canals, the Regulation of Railways Act, 1873, requires every railway and canal company to keep at their stations or wharves a book showing every rate for the time being charged for the carriage of traffic other than passengers from each station or wharf to any place to which the company book traffic, including rates charged under any special contract, as well as a statement of the distance from that station or wharf to every other station or wharf to which any such rate is charged. These books of rates are to be open to public inspection without payment (s. 14). The Railway Commissioners may require companies to distinguish the component parts of the rates charged, so that traders may know how much is charged for conveyance and how much for other expenses (*ibid.*); the Commissioners are further empowered to fix terminal charges in case of dispute (s. 15). As several canals had been acquired by railway companies, and traffic

diverted from the canals to the railways, to the prejudice of the public, provision is made by sec. 16 of the same statute prohibiting arrangements (unless with the sanction of the Railway Commissioners, or unless the railway company is expressly authorised by statute) between railway companies and canal companies, whereby any control over or right to interfere in or concerning the traffic carried, or the rates or tolls levied on any part of a canal, is given to such railway company, or any person managing or connected with the management of the same; and avoiding any agreement made subsequently without such sanction. Copies of any agreement for which it is intended to ask the sanction of the Commissioners are to be deposited not less than one month prior to such application at the office of the Commissioners, and, in addition, notice of the application is to be given locally and by advertisement in the *London Gazette*.

The Railway and Canal Traffic Act, 1888, by Part I., reconstitutes and prescribes the powers of the Railway Commission; Part II. deals with traffic facilities, and requires a uniform classification of merchandise, and uniform tolls and rates, as on railways, as to which see title RAILWAYS; and Part III. deals specially with canals. Power is given to the Railway Commissioners to make orders requiring, in the case of canals managed or controlled by railway companies, the tolls, rates, and charges so to be adjusted as that they may not have the effect of diverting traffic from the canal to the railway, to the detriment of the canal; and in default of the company so adjusting the tolls, rates, and charges, the Commissioners may do so. But to avoid applications to the Commissioners by irresponsible persons in connection with these charges on canals owned or controlled by railway companies, it is provided that as a condition precedent to the right to apply, a certificate must be obtained from the Board of Trade certifying (1) that the applicant is a fit person to make the application, and (2) that the application is a proper one to be submitted to the Railway Commissioners (s. 38). Notice of any such application is required to be served on the company concerned (*ibid.*). The same statute (s. 39) requires canal companies to furnish yearly returns to the registrar of joint-stock companies, giving the name of the company, a short description of the canal, the name of the principal officer, and the place of the company's chief office. Returns have likewise to be furnished to the Board of Trade when required, but not oftener than once a year, showing the capacity of the canal for traffic, and the capital, revenue, expenditure, and profits of the company (*ibid.*). Provision is also made for notification being made to the Board of Trade of any stoppage of the canal for more than two days (*ibid.*). An inspection of a canal may be ordered by the Board of Trade (s. 41). Sec. 42 shows again the anxiety of the Legislature to prevent the amalgamation of railway and canal companies, and the consequent increase of rates through the absence of competition; it prohibits the acquisition by railway companies of canals, or any interest in the same, unless with express statutory authority. Sec. 43 enables canal companies to enter into agreements with other canal companies for through rates; and as a corollary to this, a clearing-house may be established (s. 44).

*Abandonment of Canals.*—Sec. 45 of the Railway and Canal Traffic Act, 1888, deals with the abandonment of canals. In the case of an "unnecessary canal," *i.e.* a canal shown not to be necessary for the purposes of public navigation, the Board of Trade may, on certain formalities being complied with, grant a warrant of abandonment which relieves the company from further liability to maintain the canal. In the case of a "derelict canal," *i.e.* a canal which, for at least three years, has been unfit

for navigation, owing to the default of the company, the Board of Trade may, on the application of a local authority, or three or more owners of land adjoining or near to the canal, grant a similar warrant authorising the abandonment of the canal by the owning company; and the Board of Trade may, in such a case, frame and embody in a provisional order a scheme for the management of the canal by any person, or body of persons, or local authority to whom the Board may transfer it.

*Canal Boats.*—The Canal Boat Acts, 1877 and 1884, were passed with the object of securing that on canal boats which are used as dwellings, adequate accommodation is provided for the persons living in them, and that due attention is paid to sanitation. These Acts require each of such boats to be registered, and to be marked with distinctive letters, so painted as to be visible from either side of the canal. Provision is made for the inspection of the boats, and as regards the education of children living in them.

*Canal, Offences as to.*—1. Offences on a vessel passing along a canal can be tried in any county along or through which the vessel passes during its voyage, and where the bank or any part of a canal is the common boundary of two or more counties, an offence therein may be tried in any of the counties (7 Geo. IV. c. 64, s. 13; 7 Will. IV. and 1 Vict. c. 36, s. 37).

A similar provision is contained in the Fugitive Offenders Act, 1881, 44 & 45 Vict. c. 69, s. 21, as to offences on a journey between two British possessions (*q.v.*).

2. Malicious damage to canals is punishable under secs. 30, 31 of the Malicious Damage Act, 1861, 24 & 25 Vict. c. 97.

It is a felony—

- (a) Unlawfully and maliciously to break down, cut down, or otherwise damage or destroy the bank, dam, or wall of a canal, whereby any land or building is flooded or put in danger of flooding:
- (b) Unlawfully and maliciously to throw, break, or cut down, level, undermine, or otherwise destroy, any quay, wharf, lock, sluice, floodgate, weir, tunnel, towing-path, drain, watercourse, or other work on or belonging to a canal:
- (c) Unlawfully and maliciously to cut off, draw up, or remove any piles or other materials fixed in the ground and used to secure the bank, dam, or wall of a canal or lock:
- (d) Unlawfully and maliciously to open or draw up any floodgate or sluice, or to do any other mischief to a canal, with intent to obstruct or prevent the carrying on, completion, or maintenance of its navigation.

Penal servitude may be imposed, in the case of (a) and (b) for life, or not less than three years; in the case of (c) and (d), from three to seven years. In all these cases imprisonment with or without hard labour may be imposed as an alternative sentence. In the case of offenders under sixteen, whipping may be given in addition to any other sentence (24 & 25 Vict. c. 97, ss. 30, 31, 73; 54 & 55 Vict. c. 69, s. 1). Offences (a) & (b) are not, but offences (c) & (d) are triable at Quarter Sessions (5 & 6 Vict. c. 38, s. 1). The costs of prosecuting all the offences are payable out of the local rate (7 & 8 Geo. IV. c. 28). See also BRIDGES; and as to the meaning of maliciously, see MALICE. Local description is said to be essential in the indictment (Archbold, 21st ed., 622–624).

3. As to stealing from vessels on a canal, see BARGE.

4. As to setting fire to canal buildings, see ARSON.

5. Special provisions are made as to the policing of canals, and as to minor offences thereon, by the Canal Offences Act, 1840, 3 & 4 Vict. c. 50.

Secs. 1-5 deal with the appointment of canal police. They are paid by the owners of the canal (s. 3). Their powers are limited to the canal and its banks and towing-paths and the companies' premises. They cannot be appointed within the metropolitan police district or the City of London; and the following offences are all punishable on summary conviction (s. 14), subject under sec. 19 to appeal to Quarter Sessions, but not to removal by *certiorari* (q.v.) (s. 17):—

- (a) Being found on a canal or on locks, docks, warehouses, wharf, quay, or bank thereof, or in a vessel or boat on the canal, or in any lock or dock thereof, in possession of any instrument for unlawfully procuring wine, spirits, or other liquors or goods, or any utensil for carrying the same away (s. 7):
- (b) Unlawfully attempting to obtain any such wine, etc. (s. 7):
- (c) Unlawfully boring, breaking, or otherwise injuring the contents of any package of wine, spirits, or liquors, with intent to steal, or unlawfully drinking or spilling such contents (s. 8).

The penalty is a fine not exceeding £5, leviable by distress (ss. 7, 8, 16), or imprisonment not exceeding one month, with or without hard labour (ss. 7, 8).

Canal police, if they have just cause to suspect that a felony or any of the above offences has been or is about to be committed on a vessel lying in a canal, its docks or locks, can enter by night or day to prevent the offence, and arrest the offender (s. 9); and can also, without warrant, arrest idle and disorderly persons, or persons suspected of committing or intending to commit felony or misdemeanour, of any of the offences under the Act, and persons found loitering about canals, etc., between sunset and sunrise, who do not give a satisfactory account of themselves (s. 10). There is also power (ss. 11, 12) for the owner of property as to which an offence under the Act is committed to arrest any person found committing it, and to detain property acquired by an offence under the Act, if offered in pledge or for sale, and to seize the offender. The offences under this Act overlap, and the procedure is alternative to that under other laws (see s. 13). See VAGRANT and VAGABOND.

6. The owners of canal works in progress can (under 1 Vict. c. 80) obtain at their own cost special police to maintain order among the navvies employed.

7. The police of canals within the metropolitan police district is regulated by secs. 26-34 of the Metropolitan Police Act, 1839, 2 & 3 Vict. c. 47.

**Canals, Interoceanic.**—The right of navigating waters open to all includes the right of passing through straits which serve for communication between such waters.

"There is no reason," observes Mr. Ferguson (*International Law*, London, 1884, s. 91), "for not including in this general rule all canals or narrow straits connecting for the benefit of outside and international navigation, two open and internationally free seas, although such a canal may be an entirely or partially artificial channel dug out for the said purpose, and passing entirely through the territory of one Power. The legal status of such a canal, in the eye of international law, is but the state it actually occupies in the intercourse of nations, independent of its origin. Being once *de facto* established as an *international highway*, whether with or without

tolls, the only concern of international jurisprudence regarding it is its *raison d'être*: This is exclusively the connection of two open seas. Such a highway having once been declared open to all nations, can therefore not be legally closed again, except on the principles which govern all natural narrow passages between open seas." (See also Macdonell, "The Legal Position of the Dardanelles and the Suez Canal," *Fraser's Magazine*, May 1878).

Theoretically this may seem true, yet the rules applicable to artificial watercourses may with equal reason be held to differ from those applicable to natural watercourses, owing to the very fact that they are artificial, have come into existence at a given determinate moment, and are dug upon territory over which the sovereign State has paramount dominion. In any case interoceanic canals are considered in practice to form part of the territory they traverse, and it is only by treaty that the territorial authority abdicates any part of its sovereign power within its own frontiers.

No question has ever been raised in this connection, except as regards the Suez Canal, which, from the immense saving of distance it has effected as compared with alternative maritime routes, could not be closed without an essential disturbance of the course of European trade with the East.

The Powers have therefore, by a treaty signed at Constantinople, October 29, 1888, by the representatives of Great Britain, Germany, Austria-Hungary, Spain, France, Italy, the Netherlands, Russia, and Turkey, as the preamble thereto states, established "a definite system destined to guarantee at all times, and for all the Powers, the free use of the Suez Maritime Canal." The chief articles of this treaty are as follow:—

The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag. Consequently, the high contracting parties agree, not in any way to interfere with the free use of the canal, in time of war as in time of peace (art. 1). The maritime canal remaining open in time of war as a free passage, even to ships of war of belligerents, the high contracting parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the canal, shall be committed in the canal and its ports of access, as well as within a radius of three marine miles from those ports, even though the Ottoman Empire should be one of the belligerent Powers. Vessels of war of belligerents shall not revictual or take in stores in the canal and its ports of access, except in so far as may be strictly necessary. The transit of the aforesaid vessels through the canal shall be effected with the least possible delay, in accordance with the regulations in force, and without any other intermission (*arrêt*) than that resulting from the necessities of the service. Their stay at Port Said and in the roadstead of Suez shall not exceed twenty-four hours, except in case of distress. In such case they shall be bound to leave as soon as possible. An interval of twenty-four hours shall always elapse between the sailing of a belligerent ship from one of the ports of access and the departure of a ship belonging to the hostile Power (art. 4). In time of war belligerent Powers shall not disembark nor embark, within the canal and its ports of access, either troops, munitions, or materials of war. But in case of an accidental hindrance in the canal, men may be embarked or disembarked at the ports of access by detachments not exceeding 1000 men, with a corresponding amount of war material (art. 5). The Powers shall not keep any vessel of war in the waters of the canal (including Lake Timsah and the Bitter Lakes). Nevertheless, they may station vessels of war in the ports of access of Port Said and Suez, the number of

which shall not exceed two for each Power. This right shall not be exercised by belligerents (art. 7). See Parl. Papers, C. 5623 (1889).

The position of the proposed Central American Oceanic Canal, when it is completed, will probably be regulated in some similar way. The so-called Clayton-Bulwer treaty, a convention relative to a ship canal by way of Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America, concluded April 19, 1850, already determines that, as between Great Britain and the United States, no exclusive control over the canal shall be exercised by either Power (art. 1); also provides for the guaranteeing of the neutrality of the canal (art. 5), and for the entering of other States into similar stipulations (art. 6).

**Candidate.**—This term, in its ordinary signification, indicates a person who offers himself for election to an office; the word embodies in its etymology an interesting allusion to the white robe (*candidatus* = white-robed) worn by a candidate for office among the Romans.

In its relation to election law, the expression candidate has been defined by various statutes; and an even wider meaning has been attached to the word, in its connection with parliamentary elections, by judicial interpretation.

It has been said that the correct sense of the word candidate is a person offering himself to the suffrages of the electors (per Lord Ellenborough in *Morris v. Burdett*, 1813, 2 M. & S. 217; 14 R. R. 639). At what precise period a person becomes a candidate in this sense is the important and somewhat difficult problem that presents itself for solution.

*Statutory Definition of.*—The expressions “candidate at an election” and “candidate” are defined in the Corrupt and Illegal Practices Prevention Act, 1883, 46 & 47 Vict. c. 51, s. 63 (1), as respectively meaning, unless the context otherwise requires, any person elected to serve in Parliament at such election, and any person who is nominated as a candidate at such election, or is declared by himself or by others to be a candidate, on or after the day of the issue of the writ for such election, or after the dissolution or vacancy in consequence of which such writ has been issued. Persons who have been nominated without their consent are expressly excepted from this definition, subsec. 2 of sec. 63 providing that, where a person has been nominated as a candidate by others, if he was so nominated or declared without his consent, nothing in the Act is to be construed to impose any liability on him, unless he has afterwards given his assent to such nomination or declaration, and has been elected. If he was so nominated or declared, either without his consent or in his absence, and he takes no part in the election, he may, if he thinks fit, make the declaration respecting election expenses contained in Sched. II., Part II. of the Act, and the election agent must, so far as circumstances admit, comply with the provisions of the Act with respect to expenses incurred on account of, or in respect of, the conduct or management of the election, in like manner as if the candidate had been nominated or declared with his consent (see also ELECTION EXPENSES).

Sec. 63 in effect divides the persons who are to be considered as candidates into two classes: one is the successful candidate, that is, the person elected; and the other is the unsuccessful candidate, the person who is only nominated, or declared by himself or by others, to be a candidate on or after the day of the issue of the writ, or after the dissolution or vacancy (see per Denman, J., *Norwich*, 1886, 4 O.M. & H. 85).

Recent cases have decided that, notwithstanding the statutory definition



of the term candidate contained in the Act of 1883, a person may become a candidate before the dissolution, or vacancy, or issue of the writ, for the purpose of incurring liability for illegal practices, the acts of agents, and election expenses. Such liability is, indeed, incurred as soon as an individual comes before a constituency with a view to being elected at the next election,—as soon, in fact, as he begins to take measures to promote his election, and his candidature may be said to commence from such period (see *Montgomery*, 1892, 4 O'M. & H. 168; *Stepney*, 1892, Day's El. Cas. 117; *Walsall*, 1892, *ibid.* 112; *Lichfield*, 1895, 5 O'M. & H. 36).

In *Walsall* (1892, 4 O'M. & H. 125) it was said (per Hawkins, J.) that such period of liability must be confined within reasonable limits, and might be taken to commence from the time when it was first known that the respondent announced his intention to present himself as a candidate for election at the next ensuing election. This view was approved by Pollock, B., *Lichfield*, 1895, 5 O'M. & H. 36.

Each case must, however, be considered upon its own facts and be determined by its own particular circumstances (see per Field, J., *Kennington*, 1886, 4 O'M. & H. 94; per Hawkins, J., *Walsall*, 1892, Day's El. Cas. 112; per Lord Kyllachy, *Elgin and Nairn*, 1895, 5 O'M. & H. 12; per Bruce, J., *Lancaster*, 1896.)

As to the commencement of candidature, especially with regard to election expenses and election agency, see the judgments in *Hexham*, 1892, Day's El. Cas. 92; *Lichfield*, 1895; *Elgin and Nairn*, 1895; *Lancaster*, 1896; *Shoreditch*, 1896. See also AGENCY (ELECTION); ELECTION EXPENSES.

In relation to municipal elections, "candidate" is defined by the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, s. 77, as meaning a person elected, or having been nominated, or having declared himself a candidate for election to a corporate office. For the purpose of the Municipal Corrupt and Illegal Practices Act, 1884, 47 & 48 Vict. c. 70, the word candidate is, under sec. 34 of that Act, unless the context otherwise requires, to have the meaning given by the Municipal Corporations Act, 1882, s. 77.

*Who may be.*—With regard to the question who may be a candidate, the incapacities for being elected to, and the disqualifications for membership of, the House of Commons will be treated of under the head PARLIAMENT; see also Rogers on *Elections*, vol. ii. ch. i., 17th ed.

The qualifications and disqualifications for being elected to County Councils, Town Councils, Parish Councils, Urban District Councils, Rural District Councils, Boards of Guardians, School Boards, Metropolitan Vestries, etc., will be treated of under their various heads; see also Rogers on *Elections*, vol. iii. ch. i., 17th ed.

*Nomination of.*—The Ballot Act, 1872, 35 & 36 Vict. c. 33, s. 1, regulates the law as to the nomination of candidates for parliamentary elections. The candidate must be nominated in writing signed by two registered electors as proposer and seconder, and by eight other registered electors as assenting to the nomination. See further as to the nomination of candidates under NOMINATION.

The returning officer must, on the nomination paper being delivered to him, forthwith publish a notice of the name of the candidate nominated, and of the names of the proposer and seconder, by placarding them in a conspicuous position outside the building in which the election is held (Ballot Act, 1872, Sched. I. r. 11).

*Withdrawal of.*—A candidate may, during the time appointed for his election, but not afterwards, withdraw from his candidature by giving a

notice to that effect signed by him to the returning officer, and, where a candidate has been nominated in his absence out of the United Kingdom, the proposer may withdraw such candidate by a written notice signed by him and delivered to the returning officer, together with a written declaration of such absence of the candidate (Ballot Act, 1872, s. 1).

If, however, a candidate who has been nominated against his will omits to give this notice, he cannot, it seems, refuse to serve, "for the country and commonwealth have such an interest in every man that when by lawful election he is appointed to this public service, he cannot, by any unwillingness or refusal of his own, make himself incapable" (see *Gloucester*, 1624, Glanv.; see also 5 Rich. II. stat. 2, c. 4).

A candidate is also deemed to be withdrawn within the provisions of the Ballot Act, 1872, in case he neglects to give or tender security for the returning officer's charges in respect of the election as required by the Parliamentary Elections (Returning Officers) Act, 1875, 38 & 39 Vict. c. 84.

The returning officer must give public notice of the withdrawal of a candidate (Ballot Act, 1872, Sched. I. r. 10).

*Corrupt Withdrawal of.*—Under sec. 15 of the Corrupt and Illegal Practices Prevention Act, 1883, 46 & 47 Vict. c. 51, any person who corruptly induces or procures any other person to withdraw from being a candidate at an election in consideration of any payment or promise of payment is guilty of illegal payment; and if any candidate withdraws in pursuance of such inducement or procurement, he is also guilty of illegal payment.

*Death of.*—Where a candidate dies before the poll has commenced, the returning officer, upon being satisfied of the fact of such death, must countermand notice of the poll, and all proceedings with reference to the election must be commenced afresh in all respects as if the writ had been received by the returning officer on the day on which proof was given to him of such death; but no fresh nomination is necessary in the case of a candidate who stood nominated at the time of the countermand of the poll (Ballot Act, 1872, s. 1).

*Appointment of Election Agent by.*—As to the appointment of an election agent by a candidate, see ELECTION AGENT. It may here be mentioned that a candidate now has power under the Corrupt and Illegal Practices Prevention Act, 1883, 46 & 47 Vict. c. 51, s. 24 (2), to name himself an election agent for his own election, which formerly could not be done.

With reference to the duties of a candidate as to election expenses, and as to the personal expenses of a candidate, see ELECTION EXPENSES.

*Liability of.*—As to a candidate's liability in respect of corrupt and illegal practices committed by himself, see CORRUPT PRACTICES; ILLEGAL PRACTICES.

As to a candidate's liability for the acts of his agents, see AGENCY (ELECTION); CORRUPT PRACTICES; ILLEGAL PRACTICES.

As to the circumstances under which a candidate may obtain relief from the consequences of corrupt and illegal practices committed by his agents, see RELIEF.

*Joint Candidates.*—With regard to joint candidature the Corrupt and Illegal Practices Prevention Act, 1883, 46 & 47 Vict. c. 51, Sched. I. Part V. (4), provides that, where the same election agent is appointed by or on behalf of two or more candidates at an election, or where two or more candidates by themselves or any agent or agents hire or use the same committee rooms for such election, or employ or use the services of the

same sub-agents, clerks, or messengers, or polling agents, at such election, or publish a joint address, or joint circular, or notice, at such election, those candidates are to be deemed, for the purposes of that enactment, to be joint candidates at such election; but the employment and use of the same committee room, sub-agent, clerk, messenger, or polling agent, if accidental or casual, or of a trivial or unimportant character, is not of itself to be deemed to constitute persons joint candidates. As to the liabilities of joint candidates, see AGENCY (ELECTION); ELECTION EXPENSES; RELIEF.

**Cannot.**—On the construction of sec. 34 of the Admiralty Courts Act, 1861, which provides that in cross causes for damages arising out of the same collision where the defendant's ship in the principal cause has been arrested or security has been given, "and in the cross cause the ship of the plaintiff cannot be arrested . . . the Court may suspend the proceedings in the principal cause," etc., it was decided in *The Newbottle*, 1885, 54 L. J. P. D. & A. 16, that the word "cannot" was not limited to a physical impossibility, but included a legal impossibility by reason of privilege from arrest owing to the ship there in question belonging to a foreign Government.

**Canon Law.**—By the Canon Law we here mean the mass of legal rules administered by the ecclesiastical Courts during the Middle Ages. We must not endeavour to describe, even in the briefest manner, the prolonged process of development which issued in the existence of ecclesiastical Courts, wielding compulsory powers, and claiming to be independent of the State. Nor may we dwell upon what may be called the embryonic stage in the growth of the rules which these Courts enforced, a stage which was already beginning in the first days of Christianity. It must suffice that, no sooner had Christianity become a tolerated religion than the bishops were suffered, or even required, by the Roman State to hear and decide disputes touching the internal affairs of the Churches, and that the great ecumenical councils which were held at the Emperor's command were settling the foundations not only of dogma but also of discipline. Books containing the rules or "canons" that were ordained by these councils became current among the Churches of the West. To these ecumenical canons, which might claim the authority of all the Churches, or of an universal Church, transcribers added the canons of other famous but not ecumenical councils; and some of these were deemed to be hardly less authoritative. Also the pre-eminence of that *ecclesia* which had its home in the capital city of the world was already making itself felt. The bishop of Rome was being consulted by other bishops, and his replies to their questions were preserved and revered. The germs of an elaborate system of appeal were already visible. In the Western world—the Orient we must leave out of sight—the Pope was slowly acquiring a power of declaring law which would in course of time become a power of making law.

A distinct stage is marked by the *Collectio Dionysiana*. It was compiled about the year 500 at Rome by Dionysius Exiguus (so he called himself), a monk of Scythian birth. He collected and translated the canons of famous Eastern councils, and to these he appended some letters issued by the popes from Siricius onwards (384–498). Already conciliar canons and "decretal" letters of popes are being set side by side. His work became current in the West. A version of it (*Dionysio-Hadriana*) was sent by Pope Hadrian to Charles the Great in 774. But other collections were current. Canons

of very various origins, Oriental, African, Spanish, Gallican, were often transcribed into one book. The bishops of one province would borrow the collection which had been made in another province, and still enjoyed a considerable liberty of choosing the rules that should be accepted in their dioceses. Another celebrated collection of canons and decretals seems to have taken shape in the Spain of the seventh century. It has been known as the *Hispana* or *Isidoriana*, for without sufficient warrant it has been ascribed to S. Isidore of Seville.

Then about the year 850 this Spanish collection, which had found acceptance in Frankland, became the foundation for a superstructure of forgery. Someone, who called himself Isidorus Mercator, and who seems to have tried to personate S. Isidore, foisted into the old book a large number of decretals which purported to come from the earliest popes, the immediate successors of S. Peter. That he lived in Frankland seems plain, though attempts to fix his home more accurately have not as yet been very successful. His objects we are beginning to understand: they can only be explained out of the difficult history of the Frankish Church in its darkest age. There seems to be no reason for supposing that he had specially at heart the interests of the papacy; but those interests he indubitably furthered, not only by his endeavours to weaken the power of the metropolitans over their comprovincial bishops, but also (and this is of the utmost importance) by his propagation of the belief that ever since the apostolic age the bishops of Rome had been declaring law for the universal Church in decretal letters. By this belief the Middle Ages were ruled. Some of the forger's contemporaries seem to have had their doubts; but very soon the pseudo-Isidorian decretals were incontestable law.

The canonical materials had thus received a large accession. New and ampler collections were made, as bishop borrowed from bishop and transcriber from transcriber. Moreover, these books were beginning to take a more juristic form. A merely chronological arrangement of materials was abandoned in favour of a logical arrangement. The collector set himself to make what we might call a digest or manual of ecclesiastical law. The sphere of ecclesiastical law was now being rapidly widened. The Frankish empire was going to pieces. The State, if indeed we may talk of a State, was at its weakest, and the ecclesiastical tribunals were ever making new claims to jurisdiction over all causes in which the interests of the Churches or of the clergy were even remotely concerned. Then, in the eleventh century, the papacy emerged from an eclipse. It appeared as a reforming power making for righteousness. At the same time, in the schools of Italy, first at Pavia and then at Bologna, men were beginning ardently to study Justinian's law-books. Here were models of jurisprudence which the collectors of ecclesiastical rules would strive to imitate. Here also was a formidable rival, which threatened their theory of Church and State, for the emperor of Justinian's books is very truly supreme over all causes, ecclesiastical as well as civil, and will legislate even about dogma if he pleases. The jurisprudence of these renovated *leges* must be met by an equally professional jurisprudence of *canones*. The study of ecclesiastical law could no longer be regarded as a department of theology; it was a jurisprudence to be taught in schools, to be debated in Courts, to be argued over and developed in a lawyer-like way by professional experts, by *canonistæ* or *decretistæ*. Many treatises, which in our own day are slowly coming to light, endeavoured to meet the new demand for scientific manuals. One treatise was so successful as to

obliterate all others, and to usher in what we may call the classical age of the canon law.

About the year 1139, Gratian, a monk at Bologna, compiled a book which he called *Concordia discordantium canonum*, but which was soon universally known as the *Decretum Gratiani*. He wove together a large number of the authoritative texts (*auctoritates*), including many of pseudo-Isidorian origin, interspersing them with observations of his own (*dicta Gratiani*), which endeavoured to explain and harmonise them. This book, which was produced at the headquarters of the new secular jurisprudence, quickly supplanted all the older collections. The Church had now a text-book which could be compared with the civilian's Digest; it became the base of a large mass of gloss and comment. Among those who made abridgments of it was Roland Bandinelli, who became pope as Alexander III., and whose long pontificate (1159–81) is marked by a large number of important decretals. These newer decretals were collected by divers canonists; five of their compilations (*Quinque compilationes antiquæ*) were especially famous; the third bore the sanction of Innocent III., and the fifth was issued by Honorius III. Then, in 1230, Gregory IX. charged his penitentiary, Raymond of Penaforte, with the task of codifying all such decretals as had been issued since the date of the *Decretum*, and were to be in force for the future. The outcome was the *Decretales Gregorii IX.* This code was published in 1234. The topics dealt with by its five books are indicated by the mnemonic line *Judex, judicium, clerus, sponsalia, crimen*. It was intended by its author to be a statute-book for the universal Church. It is not a "code" in our modern sense of that term,—that is to say, it does not aim at being an exhaustive statement of the whole law,—but it was to be, like the code of Justinian, a complete collection of all the modern statutes. As such it was received by the canonists, and it was soon surrounded by a large commentary apparatus. Innocent IV. (1243–54) was among the commentators. In 1298, Boniface VIII. published a new volume compiled from the decretals issued since 1234. This, when added to Gregory's five *libri*, became the *Liber sextus decretalium*, or, more briefly, the Sext. It was meant to be, and was received as a statute-book, and as an exclusive statute-book for the period between 1234 and 1298; in other words, decretals that were not taken into it were abrogated. In 1317, John XXII. published a seventh volume, consisting chiefly of decretals issued by his predecessor, Clement V.; this also had statutory authority; it is known as the Clementines. The great legislative period was now at an end. John XXII. and his successors issued decretals of considerable importance, but no official collection was made of them. The most generally valuable of them were read and glossed in the schools; as they were not contained in the old statute-books, they were known as "extravagants." In 1500, two collections of them were added by Jean Chapuis to a Parisian edition of the older books. The one contained Extravagants of John XXII. (1316–34), the other the best known Extravagants of other popes (*Extravagantes communes*) ranging from Martin IV. to Sixtus IV. (1281–1484).

For some time past the title *Corpus Juris Canonici* had been given to the sum of the received books. A complete *Corpus* consists of six members—(1) the *Decretum* of Gratian, (2) the Decretals of Gregory IX., (3) the Sext, (4) the Clementines, (5) the Extravagants of John XXII., (6) the Common Extravagants. These six are not of equal force. The *Decretum* never received any formal sanction, and, according to the doctrine that prevails among the Roman Catholic canonists of modern

times, no text (*auctoritas*) is any the better for being contained in that volume. Such a canonist would be quite free to say that a particular text was forged and of little, if any, value. As to the *dicta Gratiani*, they were never regarded as more than the opinions of a venerated master. However, an official edition of the Decretum was published by Pius v. in 1582, and Catholics were prohibited from making changes in the text. On the other hand, the Decretals of Gregory ix., the Sext, and the Clementines are authoritative statute-books. Each of them is to be considered as a single whole published by a legislator at one moment of time, so that there can be no talk of one passage being prior to, and therefore abrogated by another and a later passage. Further, the book as a whole comes from a legislator; therefore no sentence in it can be invalidated by any discussion of its history previous to its insertion in that book, for the pope was free to alter the decretals that he was collecting and codifying. On the other hand, a passage in the Sext can overrule or abrogate a passage in the Decretals of Gregory ix., and a passage in the Sext may be overruled by a passage in the Clementines; the one will be *lex prior*, the other *lex posterior*. Lastly, the two books of Extravagants are unofficial; no decretal is the better for being in them; no decretal is the worse for not being in them. However, they have been considered to contain the most generally useful papal edicts of the period that they cover, a period of degeneration in the history of the papacy. Various portions of the *Corpus* were printed so soon as the day for print had come. The whole appeared in the Parisian edition of 1500. An official edition, the work of a congregation of cardinals, the so-called *Correctores Romani*, was issued in 1582. The *Corpus* was edited in modern times by Richter (1839) and Friedberg (1879-81); both editors were German Protestants; the existence of the official edition has hampered the Catholics. Friedberg's edition should be in the hands of every student of the canon law; but for historical purposes it is often necessary to use an old edition which gives the gloss as well as the text, for in the later Middle Ages the gloss was venerated. The classical gloss (*Glossa ordinaria*) on the Decretum comes from Joannes Teutonicus (before 1215) and Bartholomew of Brescia (*circa*, 1236), that on the Decretales Gregorii from Bernard of Parma (*circa*, 1266).

An immense mass of legal literature, academic and practical, grew up around the *Corpus Juris*. The greater part of it comes from men who, if not Italians by birth, had studied in the Italian universities; but France also produced many canonists of eminence. There were faculties of canon law in both the English universities. The doctors in canon law (*doctores in decretis, in iure canonico*) took precedence of the civilians (*doctores in legibus, in iure civili*). The course of lectures and exercises required of a candidate for a degree was long, and a degree was necessary to anyone who wished for practice in the ecclesiastical Courts. But the books read in England were for the most part foreign, and England produced no canonist of first-rate rank. In the twelfth century we may claim Ricardus Anglicus, who, however, has been too hastily identified with a bishop of Salisbury (*Dict. Nat. Biog.*); in the thirteenth, William of Drogheda, a portion of whose work still exists in manuscript; in the fourteenth, John de Athona; and in the fifteenth, William Lindwood. Of the two last we shall speak below.

By members of the Roman Catholic Church of the present day the mediæval common law is still regarded as law in so far as it has not been changed by any competent ecclesiastical authority; but very considerable changes were introduced by the Council of Trent, and during the last three

centuries the popes have legislated from time to time about many matters. The three statute-books issued by Gregory IX., Boniface VIII., and John XXII. are still statute-books, but they are old statute-books, and the law that is contained in them has been definitely and expressly altered at numerous points. The decisions and practice of the various tribunals and "congregations" at Rome would also have to be considered by anyone desirous of knowing the existing law about any particular matter. How far this system of law can be actively enforced in any given country is a different question, which in some cases is answered, at least in part, by a "concordat" between the See of Rome and the civil power. By English Courts the canon law of the Roman Catholics can only be regarded as a system of rules voluntarily accepted by the members, or at all events by the clergy, of a "non-conforming" religious body. The existence of a particular rule would therefore be, not a matter of law, but a matter of fact to be proved by the evidence of experts. Much information touching this point will be found in *O'Keeffe v. Cullen*, specially reported by H. C. Kirkpatrick (Longmans, 1874).

According to the theory propagated by the canonists of the classical age there was a great mass of law which was common to the universal Church (*ius commune*). Some room was left for local variations. In the first place, a metropolitan might make statutes for his province and a bishop might make statutes for his diocese, and these would be valid if they did not contradict law which proceeded from a higher source, in particular from the pope, and were in harmony with the first principles of ecclesiastical jurisprudence. In the second place, some respect was due to the customs of dioceses and provinces, provided that such customs were "prescript and laudable." Further, it was admitted that in certain cases a rule of statutory origin, even though it came from the apostolic see, might become obsolete, owing to non-observance. However, the space thus allowed for divergence from the *ius commune* was by no means very wide.

The two best known works of English mediæval canonists deal directly with local English law. One John of Acton, Ayton, or Athon, a canon of Lincoln, published (1333-48) a glossed version of the constitutions given to the English Church by the papal legates, Otto and Ottobon. In 1430 William Lindwood, being then the principal official of the Archbishop of Canterbury, published a glossed version of the constitutions given to the southern province by its metropolitans from the time of Stephen Langton downwards. The object of both books (a good edition of both in one volume was issued at Oxford in 1679) was to harmonise these local statutes with the general system of the *ius commune*. Uniformity in the law was secured by the appellate jurisdiction of Rome. Appeals were permissible at almost every stage of every suit, though the inferior judge was not always bound to "defer to" (*i.e.* to stay proceedings during) an appeal which he considered frivolous. But further, the doctrine gained ground that the pope was the judge ordinary of every man, and therefore that a plaintiff, neglecting all lower Courts, might, if he pleased, go straight to the supreme tribunal. This procedure was very commonly adopted by English litigants in the twelfth and thirteenth centuries. The first step which the plaintiff took was to "impetrate" a writ from Rome, which usually committed the cause to two or three English prelates, who would hear it in England, and in so doing would be acting as the pope's delegates (*judices delegati*). The writ sometimes gave them instructions as to the rules of law that they were to apply, and sometimes intrusted to them no larger duty than that of deciding questions of fact.

The claims of the Church to jurisdiction when they had reached their full latitude were exceedingly wide. Any cause which, even remotely, concerned the doctrines, sacraments, or discipline of the Church was claimed as the exclusive property of the ecclesiastical tribunals *ratione materie*. Thus, for example, the whole province of matrimonial law was annexed. Moreover, it was asserted that no criminal or "personal" action could be brought against a clerk before the secular forum; such an action would belong to the Court Christian (*q.v.*) *ratione personæ*. It is improbable that these claims were ever admitted in all their fulness by any secular power, unless this happened in the States of the Church, where the pope was both spiritual and temporal lord. Certainly both in France and England the State's Courts actively and successfully resisted what were regarded as encroachments. In particular, from Henry II.'s day onwards, the temporal power in England, by means of "writs of prohibition," kept to itself all litigation about ecclesiastical patronage; also the "benefit of clergy" (*q.v.*) that was conceded in cases of felony was but a small part of that immunity of the ordained from secular justice (*privilegium fori*), which was comprised in the Church's demand. It is unquestionably true therefore that some parts of the canon law were not enforced in this country. We must not, however, infer from this that the English ecclesiastical Courts did not consider themselves bound to administer the law that they found in the papal statute-books. It seems to be supposed by some eminent writers that in the later Middle Ages the rulers of the Church of England exercised a right of rejecting or declining to follow the decretals of Rome, even in matters which the State left to the cognisance of the spiritual tribunals; but this has hardly been proved. As to the modern law of the Church of England, see ECCLESIASTICAL LAW.

In the present century the history of the canon law has become the subject of a large literature, German, French, and Italian. The student should be warned that any book on this topic becomes antiquated very soon, owing to the rapid output of previously unpublished documents. Here, however, it may be sufficient to refer him to A. Tardif, *Histoire des sources du droit canonique*, Paris, 1887.

**Canonical Obedience.**—The obedience which the canons of the Church declare to be due to an ecclesiastical superior. By a constitution of Archbishop Winchelsey (1305), it is directed that chaplains admitted to celebrate in any church in the province of Canterbury should take an oath not to injure the rector, vicar, or other priest in charge of such church, but to humbly obey him, and do and pay him due reverence (Lindwood, 70, 71). This oath could perhaps have been required from a curate admitted to serve in a church until 1865; but the Clerical Subscription Act of that year (28 & 29 Vict. c. 122, s. 9) seems to render its exaction impossible thenceforward. On institution to a benefice, the person to be instituted takes the oath of canonical obedience to the bishop of the diocese, in the following terms:—"I, A. B., do swear that I will perform true and canonical obedience to the Bishop of \_\_\_\_\_ and his successors, in all lawful and honest things: so help me God." In Gibson's *Codex*, 2nd ed., p. 810, note 2, it is suggested that this oath is referred to in the portion of the canon law (*q.v.*) known as the Extravagants, where it is prescribed that no bishop shall compel any of his clergy to take an oath to him except those to whom the management of ecclesiastical things is committed. Every clergyman of the Church of England has, however,



previously to his institution to any benefice, made, at his ordination to the diaconate, a promise of reverent obedience to the ordinary and other chief ministers of the church, and those to whom the government and charge is committed over him; and has repeated this promise on his ordination as a priest (see the Ordinal annexed to the Book of Common Prayer). Both the clergyman's oath of canonical obedience to the bishop and the bishop's oath of canonical obedience to the archbishop (to be mentioned presently) are, by sec. 12 of the Clerical Subscriptions Act, 1865, expressly excluded from the operation of that Act.

In addition to the above-mentioned oath and promises of canonical obedience taken and made by everyone who is ordained and instituted to a benefice, all persons, clerical and lay, on the foundation of cathedral churches, are, by ancient custom, bound to make a special promise of canonical obedience to the diocesan (see, for example, the *Lincoln Cathedral Statutes*, Part I., Cambridge University Press, 1892, pp. 215, 316). The following promise is made by the whole cathedral body of St. Paul's, down to the bellringers, on the installation of a Bishop of London:—"Right Reverend Father in God, I acknowledge all canonical obedience due to you as Bishop of London" (see also Dugdale's *History of St. Paul's Cathedral*, 2nd ed., Appendix, p. 24).

Canonical obedience is also promised by the inferior members of the chapter to the dean (Dugdale, *loc. cit.*, *Lincoln Cathedral Statutes*, pp. 275, 280). The oath of canonical obedience to the archbishop of the province is taken by every bishop at his confirmation, whether to his first see or on translation, and at every consecration of a bishop, in the following terms:—"In the name of God, Amen. I, N., chosen bishop of the church and see of P., do profess and promise all due reverence and obedience to the archbishop, and to the metropolitan church of C., and to their successors: so help me God, through Jesus Christ" (see the Ordinal). The promise of obedience to the metropolitan church has reference to a vacancy of the archi-episcopal see, when the whole archi-episcopal jurisdiction is vested in the dean and chapter (*q.v.*). The Ordinal provides that the oath is not to be administered at the consecration of an archbishop; nor can it be administered at the consecration of a foreign bishop; and in the case of a bishop consecrated to a colonial see, the oath ought to be taken to the metropolitan of the colony, if any. The extent to which the taking of the oath of canonical obedience binds a clergyman to obey his bishop was argued in *Long v. The Bishop of Capetown*, 1863, 1 Moo. P. C. 411; and it was held by the Privy Council (at p. 465) that the oath does not mean that the clergyman will obey all the commands of the bishop against which there is no law, but all such commands as the bishop by law is authorised to impose.

With regard to the bishop's oath of canonical obedience to the archbishop, it was held by the Privy Council in *In re Bishop of Natal*, 1864, 3 Moo. P. C. 115, that that oath did not confer on the metropolitan any coercive legal jurisdiction as distinct from mere spiritual authority (see, however, *Read v. Bishop of Lincoln*, 1889, 14 P. D. 88, at p. 128). It has been held by Lord Penzance, Dean of Arches, that a clerk in holy orders of the Episcopal Church of Scotland, as not being in holy orders of the Church of England, nor having promised canonical obedience to an English bishop, cannot be proceeded against under the Church Discipline Act, 1840, 3 & 4 Vict. c. 86, although he has subscribed assent to the doctrines of the Church of England under 27 & 28 Vict. c. 94 (1864), and is a vicar-choral of an English cathedral (*Underwood v. Innes*; see *Law*

*Journal* for 1897, p. 30). But he is subject to the Clergy Discipline Act, 1892, 55 & 56 Vict. c. 32; see s. 12.

[Authorities in addition to those referred to above:—Godolphin, *Repertorium*; Phillimore, *Ecc. Law*, 2nd ed.]

**Canteen.**—See LICENSING.

**Canterbury, Archbishop of.**—See ARCHBISHOP.

**Canvassing.**—In relation to elections, canvassing indicates the practice, which of recent years has become very prevalent on the part of candidates and persons working on their behalf, of soliciting the support of a constituency by personally interviewing the individual electors, or otherwise communicating with them, and so ascertaining approximately the number of votes which will probably be given in favour of the candidate at the ensuing election.

Canvassing may be either by asking a man to vote for the one candidate, or by asking him not to go to the poll, but to remain neutral, and not to vote for the adversary (see *Westbury*, 1869, 1 O'M. & H. 56).

The exercise of care and discretion in the employment of persons as canvassers is of the utmost importance in the interests of the candidate. Such persons should certainly have some knowledge of the provisions of the Corrupt and Illegal Practices Prevention Acts; they should be warned against exercising any undue influence, and a caution against committing offences under the Act is, indeed, usually inserted in the canvassers' books in which they record the result of the canvass.

The election agent should keep a record of every canvass-book issued by him; it is his duty to superintend the canvassing (see the judgments in *Lichfield*, 1895). These books should be preserved, as the loss or destruction of canvass-books has always been severely commented on by the judges at the trial of election petitions (see, for example, *Worcester*, 1892, Day's El. Cas. 89).

Where any candidate is, at the trial of an election petition, proved to have personally engaged as a canvasser, or agent for the management of the election, any person, knowing that he has, within seven years previous to such engagement, been found or reported guilty of any corrupt practice, the election of such candidate will be void (Parliamentary Elections Act, 1868, 31 & 32 Vict. c. 125, s. 44). If such canvasser were employed with the actual knowledge, approval, or consent of the candidate, the election would be avoided, notwithstanding that the engagement itself was not personally effected by the candidate (see *North Norfolk*, 1869, 1 O'M. & H. 238; *Norwich*, 1871, 2 O'M. & H. 41; *Galway*, 1874, *ibid.* 197). The employment of such persons as canvassers affords ground for the presentation of a petition.

Under the provisions of sec. 17 of the Corrupt and Illegal Practices Prevention Act, 1883, 46 & 47 Vict. c. 51, the engagement or employment of persons as canvassers for payment, or promise of payment, is rendered illegal, and both the person engaging or employing, and the person so engaged or employed (if he knew that such employment was illegal) are guilty of the offence of illegal employment, which may avoid the election.

For further information as to illegal employment, see that head under the article **ILLEGAL PRACTICES**.

The employment of paid canvassers being illegal, persons who are engaged in and paid for doing registration work, should not be employed as canvassers (see *Day's El. Cas.* 36), because, under the guise of working for registration purposes, they might in reality be canvassing for the election, and thus in effect be paid canvassers (see *Stepney*, 1892, *ibid.* 119).

As to canvassing by persons who were employed and paid as clerks at an election, see the judgment of Pollock, B., *Lichfield*, 1895, 5 O'M. & H. 28.

As to canvassing by priests, see *Limerick*, 1869, 1 O'M. & H. 262; *Galway*, 1872, 2 O'M. & H. 53; *South Meath*, 1892, 4 O'M. & H. 130; *North Meath*, 1892, *ibid.* 185.

In one case, no less than three hundred persons of the lower class of voters were employed, and paid for going about with what purported to be a canvassing-book, but which appeared to have been used for registration purposes. The Court held that the employment was collusive, and would amount to bribery; no charge of bribery had, however, been made in the particulars (*Rochester*, 1892, *Day's El. Cas.* 102).

An authorised canvasser—that is, a person who canvasses with the express or implied authority of the candidate or his election agent—is an agent of the candidate, who is consequently under a liability in respect of his acts. This authority may, however, be limited in extent; but general canvassing has always been held to be strong evidence of agency (see, per Grove, J., *Wigan*, 1881, 4 O'M. & H. 13; see also on this point, **AGENCY (ELECTION)**).

But the mere fact of a man having a canvass-book is not of itself sufficient to prove agency; it is, indeed, only a step in the evidence that he is an authorised canvasser. It is necessary to prove how he got the canvass-book, and by whom he was employed, as, of course, if he were a mere volunteer, he would not be an agent so as to affect the candidate by his acts (see *Bolton*, 1874, 2 O'M. & H. 141). Where, on the other hand, an individual acted as a canvasser, and, from the circumstances, there was a clear inference that he so acted with authority, he was held to be an agent, notwithstanding that he had no regular canvass-book (see *Stroud*, 1874, 3 O'M. & H. 11).

As to how far canvassing in company with the candidate affords evidence of agency, see *Shrewsbury*, 1870, 2 O'M. & H. 36; *Salisbury*, 1883, 4 O'M. & H. 21; *Rochester*, 1892, *Day's El. Cas.* 102; see also **AGENCY (ELECTION)**.

**Cap of Maintenance.**—A cap of dignity, estate, or honour, such as is borne before the sovereigns of England at the coronation and other great ceremonies, and before the mayors of certain cities. Tindale, writing in 1528, says (*Obed. Chr. Man. Wks.* i. 186): "For their labour he (the pope) giveth to some a rose, to another a cap of maintenance." In form it is generally of crimson or purple velvet lined with fur.

**Cape Breton.**—See **CANADA**.

**Cape Colony.**—See **CAPE OF GOOD HOPE**, **NATAL**, etc.

**Cape of Good Hope.**—The name given by King John II. of Portugal to a promontory near the southern extremity of Africa. The first permanent settlement of Europeans at the Cape was founded by the Dutch about the middle of the seventeenth century. The law of the settlement was based on the Roman-Dutch jurisprudence, as modified by placats and proclamations prepared in Holland, and by the "Statutes of India" passed by the Dutch East India Company and by the Government of Java. In 1795 the British Government took possession of the Cape, and the colony was finally ceded to Great Britain in 1814. In 1850 letters patent were issued empowering the Governor and Legislative Council to make laws, and ordaining that a Parliament should be established. The Ordinance, framed in accordance with the letters patent, and confirmed by Order in Council in 1853, is the basis of the existing Constitution. In 1872 responsible government was introduced. Executive authority is exercised by the Governor, who acts also as High Commissioner for South Africa. He has extensive powers in the territories dependent on the colony, and he represents the Imperial Government in relation to the Orange Free State and the South African Republic. The boundaries of the colony have been extended by successive acts of annexation. In 1844 Natal was annexed to Cape Colony, but it was separated again in 1856. In 1876 large tracts of Kaffraria were annexed; in 1878, Walfish Bay; in 1880, Griqualand West; in 1895, British Bechuanaland. The laws of the Cape have been introduced in these territories by proclamations issued under local Acts. The Pondoland proclamation was discussed in the case of *Sprigg v. Sigcau*, which will be reported in the Appeal Cases for 1897.

The Cape Legislature consists of the Governor, the Legislative Council, and the House of Assembly. The Supreme Court consists of the Chief Justice and eight puisne judges, of whom three are assigned to the Court of the Eastern Districts, and three to the High Court of Griqualand, which sits at Kimberley. From the Supreme Court there is an appeal to the Queen in Council: see the Charter of Justice, Clark's *Colonial Law*, 475; see also the local Acts, No. 40 of 1882, and No. 3 of 1890; and, as to Griqualand, the proclamation of 27th Oct. 1871. See also PRIVY COUNCIL. The Roman-Dutch law remains the basis of the laws of the colony; but recent legislation has proceeded for the most part on English lines, and our reports are freely cited in mercantile cases.

• **Capias.**—A writ directed to the sheriff commanding him to arrest the person named therein. There are various writs of *capias*: the writ of *capias ad respondendum*, which requires the sheriff to take the person named and produce him in the Queen's Bench Division to answer the felonies or misdemeanours for which he is indicted (see Form No. 57, Crown Office Rules, 1886); *capias utlagatum*, which gives a similar direction to the sheriff to have the person named in Court to answer a certain outlawry against him (see Form No. 62, Crown Office Rules); *capias ad satisfaciendum*, which issues after judgment to take a defendant into custody until the judgment is satisfied (see Form No. 144, Crown Office Rules). These writs are now very rarely used. See EXECUTION.

**Capital Felonies.**—1. Until the reforms in the criminal law initiated by Sir Samuel Romilly, under the influence of Jeremy Bentham, all

felonies except petty larceny were, in theory, capital, with or without benefit of clergy (*q.v.*). As to the history of the mitigation of the Draconic severity of the law, see 1 Stephen, *Hist. Crim. Law*, 72.

2. The only felonies now capital in England are: (1) Murder, in which sentence of death *must* be pronounced by the presiding judge after conviction (24 & 25 Vict. c. 100, ss. 1-3);

(2) Piracy, followed by assault with intent to murder, or unlawfully doing any act whereby the life of the person attacked may be endangered (7 Will. iv. and 1 Vict. c. 88, s. 2); and

(3) Offences against the Dockyards Protection Act, 1772, 12 Geo. III. c. 24, which relates to the destruction, or attempted destruction of royal arsenals, dockyards, magazines, and ships.

On conviction of offences (2) and (3) the sentence of death need not be pronounced, and the Court may direct it to be recorded under 4 Geo. iv. c. 48, or in the Central Criminal Court (*q.v.*) under 7 Will. iv. and 1 Vict. c. 77, ss. 3-6. From 1836 till 1861 under 6 & 7 Will. iv. c. 30, sentence of death for murder could also be recorded, but the Act was repealed by 24 & 25 Vict. c. 96, s. 1. See CAPITAL PUNISHMENT.

**Capital Monies.**—See SETTLEMENT; TENANT FOR LIFE.

**Capital Punishment.**—*Meaning.*—In English law capital punishment means the penalty of death inflicted in pursuance of judicial sentence, it being a cardinal principle of the constitution that no one is to be put to death without being brought to answer in due process of law (see Mag. Car. c. 39; 28 Edw. III. c. 3; Hale, *Pleas of the Crown*, vol. i. p. 497). As to its meaning in the Roman law, see Hunter's *Roman Law*, 1064.

*History.*—Capital punishment has had a very remarkable history in the English criminal law. (See Stephen, *Hist. Crim. Law*, vol. i.; Pollock and Maitland, *Hist. Eng. Law*, vol. ii. ch. viii. See also BENEFIT OF CLERGY; CAPITAL FELONIES; TRANSPORTATION.)

Under the Saxon polity the punishment of death appears to have been comparatively rarely resorted to. The characteristic punishment of the period was the infliction of pecuniary penalties on a scale graduated according to the social position of the injured party. Thus in the case of homicide, a "*wer*" or monetary penalty assessed according to the rank of the deceased was payable to his relations, and a "*wite*" or fine was due to the king in respect of the crime. For most offences a "*bote*" or compensation in money was payable to the person aggrieved. Certain crimes were, however, "*boteless*"; for these, and after previous convictions, the penalty was death or mutilation (see Kemble, *Saxons in England*; Stubbs, *Const. Hist.* vol. i.; Stephen, *Hist. Crim. Law*, vol. i.; Pollock and Maitland, *Hist. Eng. Law*, vol. ii. ch. viii.). This system illustrates the fact that in all primitive societies punishment takes the forms which are most easily inflicted. Imprisonment is a refinement of a later stage in the growth of civilisation.

Capital punishment was altogether abolished by William I., and mutilation substituted for it (see Freeman, *Norman Conquest*, vol. iv. p. 625, vol. v. 400); but during the early Norman reigns death became the common punishment for felony, and until 1826 continued to be the penalty for treason and all felonies, except mayhem and petty larceny (see Stephen,

*Hist. Crim. Law*, vol. i. p. 458; Freeman, *Norman Conquest*, vol. v. p. 158; Pollock and Maitland, *Hist. Eng. Law*, vol. ii. ch. viii.).

But this was subject to the important exceptions engrafted by the peculiar privilege of benefit of clergy, under which persons entitled to the privilege escaped capital punishment (see **BENEFIT OF CLERGY**). Certain crimes were always excluded from benefit of clergy. Treason, highway robbery, and arson were non-clergyable offences, and therefore capital. During the sixteenth and seventeenth centuries certain other felonies, *e.g.* homicide and burglary, were by statute made non-clergyable, and hence became punishable with death. In the eighteenth century, which marks the most severe period in the history of capital punishment, numerous statutes created new felonies without benefit of clergy, thus adding still further to the list of capital crimes (see Stephen, *Hist. Crim. Law*, vol. i.; Pollock and Maitland, *Hist. Eng. Law*, vol. ii. ch. viii.).

As a matter of fact, however, the number of cases in which the death sentence was pronounced was very much greater than that in which it was carried into execution, pardon on condition of transportation being usually granted (see the Habeas Corpus Act, 1679, 31 Car. II. c. 2, ss. 13, 14; and 8 Geo. III. c. 15; see also **TRANSPORTATION**). Early in this century also a series of statutes substituted transportation for capital punishment in many cases (see 7 Will. IV. and 1 Vict. c. 81, s. 1; the Piracy Act, 1837, 7 Will. IV. and 1 Vict. c. 88, s. 3; the Punishment of Offences Act, 1837, 7 Will. IV. and 1 Vict. c. 91, s. 1; 4 & 5 Vict. c. 56).

The privilege of benefit of clergy with respect to persons convicted of felony was abolished by the Criminal Law Act, 1827, 7 & 8 Geo. IV. c. 28, s. 6; and it was provided that no person convicted of felony should suffer death unless it were for some felony which was previously excluded from the benefit of clergy, or which might be made punishable with death by legislation subsequent to the Act (*ibid.* s. 7). This provision was enacted with regard to Ireland by the Criminal Law (Ireland) Act, 1828, 9 Geo. IV. c. 54, s. 13.

Several statutes of the same reign consolidated various branches of the criminal law, and retained the punishment of death in a very large number of cases (see 7 & 8 Geo. IV. c. 29; 7 & 8 Geo. IV. c. 30; 9 Geo. IV. c. 31; 11 Geo. IV. and 1 Will. IV. c. 66).

The present state of the law was attained by a series of statutes, from 1832 to 1861, gradually abolishing the death penalty for various offences. The history of this legislation is set forth in detail in Stephen's *Hist. Crim. Law*, vol. i.; see also **CAPITAL FELONIES**. As to Ireland, see the Capital Punishment (Ireland) Act, 1842, 5 & 6 Vict. c. 28.

In 1864 a Royal Commission was appointed to inquire into the operation of the law relating to capital punishment. As the result of their investigations the Commission recommended that capital punishment should be retained in certain cases. See the Report of the Capital Punishment Commission, published in 1866.

*Recording Sentence of Death.*—The Judgment of Death Act, 1823, 4 Geo. IV. c. 48, s. 1, enables the Court on a conviction for any felony except murder, instead of pronouncing sentence of death, to order the sentence to be recorded. By sec. 2 of the same Act a record so entered is to have the same effect in all respects as if the judgment had actually been pronounced in open Court, and the offender had been reprieved by the Court. See also the Central Criminal Court Act, 1837, 7 Will. IV. and 1 Vict. c. 77.

The same power of recording judgment of death was given to the Court in the case of murder by 6 & 7 Will. IV. c. 30, s. 2 (see *R. v. Hogg*,

1849, 2 Moo. & R. 380); but this statute was repealed by 24 & 25 Vict. c. 95.

*Present Law.*—It may be well here to consider briefly the existing law relating to the infliction of capital punishment, and the various classes of offences to which it is applicable.

1. *Treason.*—The present punishment for treason is hanging by the neck until the offender be dead (see the Treason Act, 1814, 54 Geo. III. c. 146, and the Forfeiture Act, 1870, 33 & 34 Vict. c. 23, s. 31). If the offender be a man, Her Majesty has power, by warrant under her sign-manual, countersigned by a principal Secretary of State, to direct the offender to be beheaded instead of being hanged (see the Treason Act, 1814, 54 Geo. III. c. 146, s. 2). As to the punishment at common law, see 4 Chit. *Crim. Law*, 365; the preamble to the Treason Act, 1814; and the Treason Act, 1790, 30 Geo. III. c. 48.

As to what constitutes the crime of treason, see TREASON; see also TREASON FELONY.

2. *Murder.*—The Offences Against the Person Act, 1861, 24 & 25 Vict. c. 100, s. 1, enacts that whosoever shall be convicted of murder shall suffer death as a felon. Sec. 2 provides that upon a conviction for murder sentence of death is to be pronounced and carried into execution, as before the Act. The mode of execution for felony at common law was hanging by the neck; this still, therefore, continues to be the punishment for murder.

3. *Piracy with Violence.*—The Piracy Act, 1837, 7 Will. IV. and 1 Vict. c. 88, s. 2, enacts that whosoever with intent to commit, or at the time of, or immediately after, committing the crime of piracy in respect of any ship or vessel, shall assault with intent to murder any person being on board of or belonging to such ship or vessel, or shall stab, cut, or wound any such person, or unlawfully do any act by which the life of such person may be endangered, shall be guilty of felony, and being convicted thereof shall suffer death as a felon. Though piracy with violence still continues to be a capital offence, judgment of death may be recorded instead of being pronounced under the Judgment of Death Act, 1823, 4 Geo. IV. c. 48 (*vide supra*). See PIRACY.

4. *Burning Ships of War, etc.*—Under the Dockyards, etc., Protection Act, 1772, 12 Geo. III. c. 24, persons wilfully setting on fire or burning or otherwise destroying any of Her Majesty's ships of war; or any of Her Majesty's arsenals, magazines, dockyards, ropeyards, victualling offices, or any buildings belonging thereto; or any timber or materials there placed for building, repairing, or fitting out ships; or any of Her Majesty's military, naval, or victualling stores, or other ammunition of war, or any place where such stores, etc., are kept or placed, are guilty of felony and punishable with death. In these cases also sentence of death may be recorded under the Judgment of Death Act, 1823, 4 Geo. IV. c. 48 (*vide supra*).

5. *Naval Offences.*—The Naval Discipline Act, 1866, 29 & 30 Vict. c. 109, which provides for the government and discipline of the navy, enables the punishment of death to be inflicted in the navy (s. 52 (1)); but it can only be awarded by a court-martial (s. 56). Numerous offences by officers and men in the navy in relation to misconduct in the presence of the enemy, mutiny, desertion, etc., are made punishable with death (see ss. 2-7, 10-13, 19, 30, and 34). Judgment of death is not to be passed on any prisoner unless four at least of the officers present at the court-martial where the number does not exceed five, and, in other cases, a majority of not less than two-thirds of the officers present, concur in the sentence (s. 53 (2)). Except in the case of mutiny, the punishment of death is not to be inflicted on any

prisoner until the sentence has been confirmed by the Admiralty, or by the commander-in-chief on a foreign station (s. 53 (3)). As to the constitution and proceedings of naval courts-martial, see secs. 58–69 and sec. 2 of the Naval Discipline Act, 1884, 47 & 48 Vict. c. 39. See further Thring, *Criminal Law of the Navy*; see also the articles COURTS-MARTIAL; NAVY.

6. *Military Offences*.—Under the Army Act, 1881, 44 & 45 Vict. c. 58, numerous military offences are made punishable with death (see ss. 4, 6 (1), 7, 8 (1), 9 (1), and 12 (1)). The punishment of death cannot be imposed by any Article of War made under the Act, except for crimes which are expressly made liable to such punishment by the Act (s. 69). As to when a court-martial has power to sentence to death for offences punishable by ordinary law, see sec. 41. As to the power of a court-martial to inflict capital punishment in respect of offences committed by persons subject to military law, see sec. 44 (a) and (h). Sentence of death is not to be passed by a general court-martial without the concurrence of two-thirds at least of the officers serving on the court-martial (s. 48 (8)), and no prisoner is to be sentenced to death by a field general court-martial without the concurrence of all the members (s. 49 (2)). As to confirmation or revision of the sentence of a court-martial, see sec. 54. Sentence of death passed by a court-martial in a colony, in addition to the confirmation otherwise required by the Act, must be approved by the governor of the colony, unless it were passed in respect of an offence committed on active service (s. 54 (7)); in India such sentence must be approved by the Governor-General (s. 54 (8)). As to commutation and remission of the death sentence, see sec. 57. As to the effect of the execution of the sentence of death by a court-martial without jurisdiction, see Hale, *Pleas of the Crown*, vol. i. 497, 500. Generally as to capital punishment in its relation to military law, see the *Manual of Military Law* issued by the War Office, 1894. See also MARTIAL LAW; MILITARY LAW; COURTS-MARTIAL.

*Prisoners under Sentence of Death*.—The regulations with regard to prisoners under sentence of death are contained in Sched. I., No. 61 of the Prisons Act, 1865, 28 & 29 Vict. c. 126.

In the case of a prisoner under sentence of death, if it appears to a Secretary of State, either by means of a certificate signed by two members of the visiting committee of the prison in which such prisoner is confined, or by any other means, that there is reason to believe him to be insane, the Secretary of State is to appoint two or more legally qualified medical practitioners, who are forthwith to examine the prisoner and inquire as to his sanity, and report in writing to the Secretary of State as to his sanity (Criminal Lunatics Act, 1884, 47 & 48 Vict. c. 64, s. 2 (4)).

*Place of Execution*.—Executions formerly took place in public, but the Capital Punishment Amendment Act, 1868, 31 & 32 Vict. c. 24, s. 2, provides that judgment of death on any prisoner sentenced for murder is to be carried into effect within the walls of the prison in which the offender is confined at the time of execution. This Act applies only to executions for murder (see ss. 2 and 16; see also Stephen, *Digest of Crim. Law*, 5th ed., p. 46, note 1, and p. 79, note 2). The Spring Assizes Act, 1879, 42 & 43 Vict. c. 1, s. 3, enables the execution to take place in any prison in which the convict was confined for the purpose of safe custody prior to his removal to the place where the assizes were held. Under the Central Criminal Court (Prisons) Act, 1881, 44 & 45 Vict. c. 64, s. 2 (5), where judgment of death is passed at the Central Criminal Court upon a person convicted of any offence, the judgment may be carried into execution in any prison in the Central Criminal Court district, or in the county, if any, where



the offence was committed or is supposed to have been committed, which the judge may order; and if no order is made, then in the prison in which the convict is for the time being confined. As to execution on conviction in a county for an offence committed in a county of a city, see the Counties of Cities Act, 1811, 51 Geo. III. c. 100, and the Criminal Justice Administration Act, 1851, 14 & 15 Vict. c. 55, s. 23.

*Duties of Sheriff.*—With regard to the duties and powers of the sheriff as to execution of judgment of death, the Sheriffs Act, 1887, 50 & 51 Vict. c. 55, s. 13, provides that where judgment of death has been passed upon a convict the sheriff of the county is charged with the execution of the judgment, and may carry out the execution in any prison which is the common gaol of his county, or in which the convict was confined for the purpose of safe custody prior to his removal to the place where the Court was held, and is for the purpose of such execution to have the same jurisdiction and powers over the prison in which the judgment is to be carried into execution, whether such prison is or is not situate within his county, and over the officers of such prison, as he has by law over the common gaol of his county and the officers thereof. See also the Prisons Act, 1877, 40 & 41 Vict. c. 21, s. 30, and the Central Criminal Court (Prisons) Act, 1881, 44 & 45 Vict. c. 64, s. 2. As to the execution of the sentence of death on criminals in the county of Chester, see the Chester Courts Act, 1867, 30 & 31 Vict. c. 36, s. 4.

*Regulations as to Executions.*—Under the Capital Punishment Amendment Act, 1868, 31 & 32 Vict. c. 24, s. 3, the sheriff charged with the execution, and the gaoler, chaplain, and surgeon of the prison, or their deputies (see s. 11), and such other officers of the prison as the sheriff requires, are to be present at the execution. Any justice of the peace for the county, borough, or other jurisdiction to which the prison belongs, and such relatives of the prisoner, or other persons as the sheriff or visiting justices think proper to admit, may also be present.

The Secretary of State is empowered from time to time to make such rules and regulations with regard to the execution of judgment of death in every prison as he may deem expedient for the purpose of guarding against any abuse in the execution, of giving further solemnity to the same, and of making known without the prison walls the fact that such execution is taking place (*ibid.* s. 7).

As soon as possible after the execution the prison surgeon is to examine the body and ascertain the fact of death, and sign a certificate, and deliver it to the sheriff. The sheriff and gaoler and chaplain of the prison, and such of the other persons present as the sheriff requires or allows, are also to sign a declaration to the effect that the judgment of death has been executed (*ibid.* s. 4).

*Inquest.*—A coroner's inquest is to be held on the body within twenty-four hours after the execution, and the jury at the inquest are to inquire and ascertain the identity of the body, and whether judgment of death was duly executed (*ibid.* s. 5). See also the Central Criminal Court (Prisons) Act, 1881, s. 2 (5).

*Burial.*—The Offences against the Person Act, 1861, 24 & 25 Vict. c. 100, s. 3, provides that the body of every person executed for murder is to be buried within the precincts of the prison in which he was last confined at the conviction, and the sentence of the Court is so to direct. The Capital Punishment Amendment Act, 1868, s. 6, enacts that the body is to be buried within the walls of the prison within which the execution took place, unless a Secretary of State is satisfied, on the representation of the visiting justices,

that there is not convenient space within the walls for burial; in which case he may by writing appoint some other fit place for that purpose.

*General.*—The social and ethical aspect of capital punishment is beyond the scope of this article; for a consideration of the subject from these points of view reference should be made to the following works:—Beccaria, *Essay on Crimes and Punishments*, 1807; Bentham, *Rationale of Punishment*, 1830; Carmignani, *Sulla pena di Morte*, 1836; Mittermaier on *Capital Punishment*, by Moir, 1865; Copinger, *Essay on Abolition of Capital Punishment*, 1876; Du Cane, *Punishment and Prevention of Crime*, 1885; Romilly, *The Punishment of Death*, 1886; Garofalo, *Criminologia*, 1890; Curtis, Pamphlet on Capital Punishment, 1891; Tallack, *Penological and Preventive Principles*, 2nd ed., 1895.

**Capitation Grant.**—See ELEMENTARY EDUCATION.

**Capitulate.**—From *capitulare*, to draw up in chapters or under different headings, hence to draw up terms of agreement, make conditions, negotiate, and lastly, conclude articles of surrender as distinguished from surrendering at discretion. See CAPITULATION; CAPITULATIONS.

**Capitulation** (for original sense, see CAPITULATE).—Properly the making of terms for surrender of troops, fortresses, or a district to an enemy, but now commonly used for the surrender itself.

A capitulation is within the scope of the general powers intrusted to military and naval commanders. "Stipulations between the governor of a besieged place and the general or admiral commanding the forces by which it is invested if necessarily connected with the surrender, do not require the subsequent sanction of their respective sovereigns. Such are the usual stipulations for the security of the religion and privileges of the inhabitants, that the garrison shall not bear arms against the conquerors for a limited period, and other like causes properly incident to the particular nature of the transaction" (Wheaton, *International Law*, 6th ed., 1855, p. 473; Rivier, *Droit des Gens*, 1896, vol. ii. p. 361).

According to the *Instructions for the Government of Armies of the United States in the Field*, which were prepared by the distinguished American jurist, Francis Lieber, "So soon as a capitulation is signed the capitulator has no right to demolish, destroy, or injure the works, arms, stores, or ammunition in his possession during the time which elapses between the signing and the execution of the capitulation, unless otherwise stipulated in the same" (art. 144).

The Russian jurist, Professor F. de Martens, sets forth the Russian view in the following interesting passage, translated from the French edition of his book:—

"As regards the conditions on which a fortress or troops may capitulate, they are governed by the military laws of the country to which the said fortress or troops belong. International law does not apply in this case. The commander of a place may violate its prescriptions. It hardly matters to the hostile troops, provided he hoists the flag of truce and undertakes to surrender. As to the conditions of the capitulation itself, they depend upon the conventions concluded between the parties. In no case is it permissible to exterminate the inhabitants of a fortified place, or to pillage their

dwellings, even when they have placed themselves at the mercy of the conqueror. When a whole army or a detachment of troops capitulates, it is the rule that the conditions imposed upon the conquered must not be contrary to military honour. Officers are generally left in possession of their arms as an honourable acknowledgment to them, and their personal property is also respected. The enemy takes possession of the standards, the arms, the treasure of the army, etc. Neither the commander of a fortress which capitulates, nor of troops which surrender, has any right to make engagements in the name of his Government, or to contract any political obligation" (*Droit International*, traduit par Alfred Léo, Paris, 1887, vol. iii. p. 304).

In reference to the last paragraph of the above quotation, see also Wheaton, *op. cit.* p. 473. States have on different occasions treated engagements of a general (political) character entered into by military commanders as *ultra vires*. This was the case with Kleber's capitulation of January 24, 1800, for withdrawal of the French army from Egypt (Rivier, *op. cit.* vol. ii. p. 361).

It was also the case when Lord William Bentinck, in 1814, promised to acknowledge the freedom and independence of Genoa which the British Government shortly afterwards annexed to the kingdom of Sardinia (Blunstchli, *Das Moderne Völkerrecht*, 1872, s. 699, note; Phillimore, *International Law*, vol. iii. ss. 122-126).

The capitulations during the Franco-German War usually contained the following conditions:—The conquered army to be prisoners of war. Officers and functionaries who undertake upon their honour and in writing to do nothing against German interests during the war to be excepted. All war material to be handed over with the place surrendered. Doctors to remain and attend the wounded.

At the capitulation of Metz (October 7, 1870), the soldiers were permitted, after the handing over of their arms, to keep their knapsacks, personal effects, and camping gear; and the officers who preferred captivity to an honourable understanding to take no part in the war, to carry their swords and their private belongings. More favourable conditions were accorded to the garrison of Belfort (February 15, 1871) after the conclusion of the general armistice. They were allowed to leave the place with the honours of war and retain their arms, baggage, and military equipments (Blunstchli, *op. cit.* s. 699).

**Capitulations.**—The name given to articles of agreement (for origin, see CAPITULATE), by which the Porte in 1535 granted certain immunities and privileges to French subjects. These immunities and privileges were in the reign of Elizabeth extended to English subjects (Twiss, *Law of Nations*, 1884, p. 463). Treaties of a similar character have been concluded by China with Great Britain (July 22, 1843), the United States (July 3, 1844), France (Oct. 24, 1844), and Russia (June 13, 1858), and by Japan with Great Britain (August 26, 1858), and most other European States.

"Such treaties," observes Twiss, "are in the highest degree exceptional. But the law of European nations has itself always been exceptional in its application to Mohammedan and other non-Christian nations. Amongst Christian States there are no such fundamental differences in their respective standards of morality, as to render the criminal law of one State totally inapplicable to the subjects of another State; but amongst the Mohammedan and Buddhist nations there is so essential a diversity

in the sanctions, which religion and morality attach to human conduct, as contrasted with those which prevail throughout Christendom, that from the oldest time an immiscible character between Europeans and Orientals has been maintained. Europeans are not admitted into the general body and mass of the society of Asiatic nations; they continue strangers and sojourners in the land, if they reside amongst them; they form *de facto* an extra-territorial community, which does not acquire a national character by permanent residence amongst them" (*Law of Nations*, Oxford, 1884, 2nd ed., p. 267).

In a treaty of commerce and navigation between Great Britain and Japan, dated July 16, 1894, the capitulation *régime* applied at present in the latter country will come to an end as regards British subjects in a few years. The treaty provides that from the date at which it comes into force it shall take the place of a number of existing conventions, and that consequently the jurisdiction until then exercised by British Courts in Japan, and "all the exceptional privileges, exemptions, and immunities then enjoyed by British subjects as a part of, or appurtenant to, such jurisdiction, shall absolutely and without notice cease and determine, and thereafter all such jurisdiction shall be assumed and exercised by Japanese Courts" (art. xx.). The present treaty is not to take effect until at least five years after its signature, but it may come into force one year after the Japanese Government shall have given notice to Her Britannic Majesty's Government of its wish to have the same brought into operation. Such notice may be given at any time after the expiration of four years from the date thereof (art. xxi.).

**Caption** (*capitio, capere*).—Caption bears the same relation to a "commission" as a "return" does to a "writ." According to Jacob, *Law Dictionary* (s.v.), the term originally meant the certificates, by persons intrusted with a duty by a commission, that they have executed their commission, and related chiefly to business of two kinds:—

(a) Commission to take fines of lands (see FINES AND RECOVERIES).

(b) Commissions to take answers in bills in Chancery and depositions. The bills are abolished, and the modern counterpart to this form of caption is the caption put at the end of an affidavit or statutory declaration by the commissioner of oaths before whom it is taken or made, and the certificate of an examiner of the Court, or commissioner to take evidence, that he has executed his commission. See COMMISSION, EVIDENCE ON.

At present the term is applied almost exclusively to the formal heading to an indictment, deposition, affidavit, or recognisance, stating before whom it was found, taken, or made, and such matters as show that it was regularly taken or made before a Court or person lawfully entitled to take it. All these documents have by law to be sent to or filed in some Court, and the caption authenticates them (see 11 & 12 Vict. c. 42, ss. 17, 20; Taylor on *Evidence*, 9th ed., ss. 487, 892). See DEPOSITION.

In the case of bedside depositions taken under 30 & 31 Vict. c. 35, s. 6, the section prescribes the addition to the deposition, by way of caption, of a statement of the reasons for taking it, and when or where it was taken, and the names of all persons present at the taking.

The rolls of a Court of Assize or Quarter Sessions, as the Courts were held under commissions of gaol delivery, oyer and terminer, or of the peace, had prefixed to the record of the indictments tried a caption or formal heading showing the commission and sitting of the Court, and the names

and swearing of at least twelve of the grand jurors by whom the indictments were found. The whole forms a sort of preamble, but is not part of the indictment. This kind of caption is not now in use, except where the record of a criminal trial is made up for the purposes of a writ of error or of *certiorari*. As to their form, see Archbold, *Cr. Pl.*, 21st ed., 44; Short and Mellor, *Cr. Off. Pr.* 704; 1 Chit. *Crim. Law*, 327-336.

**Captive.**—One taken prisoner in war. The following articles from the rules drawn up by the Institute of International Law (1880) may be taken as the views approved by jurists, and, so far as circumstances permit, as the practice of civilised Belligerents (*q.v.*) in regard to captives:—

Captivity is neither a punishment inflicted on prisoners of war nor an act of vengeance; it is merely a temporary detention which is devoid of all penal character.

Prisoners of war are at the disposal of the enemy Government, not of the individuals or corps which have captured them.

They are subjected to the laws and rules in force in the enemy army.

They must be treated with humanity.

All that belongs to them personally, except arms, remains their property.

Prisoners are bound to state, if asked, their true name and rank. If they do not do so, they may be deprived of all or any of the mitigations of imprisonment enjoyed by other prisoners circumstanced like themselves.

Prisoners may be subjected to confinement in a town, fortress, camp, or any other place, definite bounds being assigned which they are not allowed to pass; but they can only be confined in a building when such confinement is indispensable for their safe detention.

Insubordination justifies whatever measures of severity may be necessary for its repression.

Arms may be used against a fugitive prisoner after summons to surrender. If he is taken before he has rejoined his army, or has escaped from the territory under the control of his captor, he may be punished, but solely in a disciplinary manner, or he may be subjected to more severe surveillance than that to which prisoners are commonly subjected. But if he be captured afresh after having accomplished his escape, he is not punishable unless he has given his parole not to escape, in which case he may be deprived of his rights as a prisoner of war.

The Government detaining prisoners is charged with their maintenance. In default of arrangement between the belligerents on this point, prisoners are given such clothing and rations as the troops of the capturing State receive in time of peace.

Prisoners cannot be compelled to take part in any manner in the operations of the war, nor to give information as to their country or army.

They may be employed upon public works which have no direct relation to the operations carried on at the seat of war, provided that the labour be not exhausting in kind or degree, and provided that the employment given to them is neither degrading with reference to their military rank if they belong to the army, nor to their official or social position if they do not so belong.

When permission is given to them to work for private employers, their wages may be received by the detaining Government, which must either use it in procuring comforts for them, or must pay it over to them on their liberation, the cost of their maintenance being, if necessary, first deducted.

*Termination of Captivity.*—The reasons which justify the detention of a captured enemy last only during the continuance of the war; consequently, the captivity of prisoners of war ceases, as a matter of course, on the conclusion of peace; but the time and mode of their actual liberation is a matter for agreement between the Governments concerned.

Under the Convention of Geneva, captivity ceases, as a matter of course, before the date fixed upon for general liberation, in case of wounded or sick prisoners who, after being cured, are found to be incapable of further service. The captor must send these back to their country so soon as their incapacity is established.

*During the War*, prisoners may be released by means of a cartel (*q.v.*) of exchange negotiated between the belligerent parties.

Even without exchange, prisoners may be set at liberty on parole if the laws of their country do not forbid it. The conditions of their parole must be clearly stated. If so set at liberty, they are bound on their honour to fulfil scrupulously the engagements which they have freely entered into. Their Government on its part must neither require nor accept from them any service inconsistent with their pledged word.

A prisoner cannot be compelled to accept his liberty on parole. In the same way the enemy Government is not obliged to accede to a request made by a prisoner to be released on parole.

Prisoners liberated on parole and retaken in arms against the Government to which they are pledged, can be deprived of the rights of prisoners of war, unless they have been included among prisoners exchanged unconditionally under a cartel of exchange negotiated subsequently to their liberation (*Annuaire* of 1893, p. 185 *et seq.*).

**Capture** (International Law).—The forcible taking of a non-fighting ship in time of war. (See **PRIVATEERING**; **PRIZE**.)

**Cards.**—1. There is not now any prohibition against importing playing-cards; but from 1701 (10 Anne, c. 19) until 1853 (16 & 17 Vict. c. 107) such prohibition existed. Many Acts were also passed imposing a stamp duty on playing-cards, beginning at 6d. (9 Anne, c. 23) and rising to 2s. a pack (29 Geo. III. c. 30), and containing elaborate provisions for regulating the manufacture with a view to protecting the revenue (see Burn, *Justice*, 17th ed., vol. i. p. 327).

*Home-made Cards.*—Playing-cards made in England are subject to a stamp duty of 3d. per pack of 52 cards; and English makers must take out an excise licence from the Commissioners of Inland Revenue, which costs £1 a year (25 & 26 Vict. c. 22, ss. 1, 28, 29, 30, Sched. C; 27 & 28 Vict. c. 56, s. 6).

The duty is denoted (1) on the wrapper of each pack made by the Commissioners of Inland Revenue and sold by them to the makers, or (2) on wrappers made by the maker of the cards, and stamped by the Commissioners (25 & 26 Vict. c. 66, s. 29). English cards must be sold in separate packs, enclosed in wrappers showing the stamp, and securely fastened and so made that they cannot be opened without being destroyed. The maker's name must be printed on the wrapper (s. 33), which must be cancelled by the seller (s. 34) before the cards are delivered or sent out. This does not apply where the sale is wholesale, with a view to selling again, but would apply to wholesale sale to a club for use.

Penalties are imposed on makers of cards who sell without a licence (25

& 26 Vict. c. 22, s. 31; 38 & 39 Vict. c. 66); and on persons who sell cards, except in stamped wrappers and for frauds relating to wrappers, with the intent or result that they may be used more than once (s. 35). The penalties are now recoverable under the Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21).

The following playing-cards are exempted from duty :—

- (1) Cards imported on which duty has been paid.
- (2) Toy cards not more than  $1\frac{3}{4}$  in. long and  $1\frac{1}{4}$  in. wide.
- (3) Cards resold after use to a licensed maker, unless they are resold by him (25 & 26 Vict. c. 22, s. 36).

Unstamped cards may be exported, subject to regulations enabling the Inland Revenue to see that the exportation is honest (25 & 26 Vict. c. 22, s. 37).

*Imported Cards.*—Playing-cards imported into the United Kingdom are subject to a duty of 3s. 9d. per dozen packs (39 & 40 Vict. c. 35, s. 1, sched.), and may be lawfully sold there, subject to the provisions of the Customs Consolidation Act, 1853, 16 & 17 Vict. c. 107, ss. 114–116, which are saved, with a modification, by the Customs Consolidation Act, 1876, 39 & 40 Vict. c. 36, s. 286. These provisions, except as to exaction of stamp duty, closely resemble those of the Act of 1862 as to English-made cards. Penalties for breaches of the Act of 1893 are recoverable like stamp duties (16 & 17 Vict. c. 107, s. 114).

2. As to the legality of card-playing, see GAMING.

**Cargo.**—“‘Cargo’ is a word with different meanings. It may mean one thing in a charter-party, another in a policy, another in a contract of sale.” “It is a word susceptible of different meanings in different contracts, and must be interpreted with reference to the context” (Lord Bramwell and Sir Barnes Peacock, *Colonial I. C. of New Zealand v. Adelaide I. C.* 1886, 12 App. Cas. 128).

Thus, in a policy, cargo may mean only part of a cargo, unless the insurance can only refer to a full cargo; and it has been held that under a policy on “a cargo of wheat now on board or to be shipped,” which had been sold to the assured free on board, in bags, at a fixed sum per bag, the vessel’s full cargo being 13,000 bags, but only 2500 being on board when she was lost, the assured had an insurable interest in the amount shipped, and could recover for their loss for the property in each bag passed as it was put on board (*ibid*). In another case where a contract had been made for the purchase of “a cargo of rice per *Sunbeam*, 707 tons register, at so much per cwt. cost and freight,” and the purchaser insured the cargo at and from the port of loading, and the ship was lost at the port before the cargo was all on board, the Court of Exchequer held that the purchaser could recover on his policy, while the Court of Exchequer Chamber held that he could not, and the House of Lords was equally divided (*Anderson v. Morice*, 1876, 1 App. Cas. 713).

Where the full cargo of a vessel is the subject of a contract of sale, and is mentioned as being of a certain quantity, the contract is that goods of that quantity shall be sold, and not merely the goods which that vessel can carry (*Bourne v. Seymour*, 1855, 24 L. J. C. P. 202); while in a charter-party a contract to carry “a cargo of 470 quarters of wheat in sacks, and (or) other lawful merchandise,” the words “full and complete” which preceded the word cargo in the printed form having been struck out, was held to mean that the wheat was not to be the whole cargo of the ship, but that the freighter could load other goods at another port (*Caffin v. Aldridge* [1895],

2 Q. B. 648); and a contract to carry a full cargo of so many tons is satisfied by the charterer landing the full cargo which the vessel can carry even if it fall short of the quantity (*Rotherfield S. S. Co. v. Tweedie*, 1897, 13 T. L. R. 183).

The present article deals only with cargo as the subject of charter-parties and bills of lading; for its position under policies and contracts of sale, see MARINE INSURANCE and SALE.

The rights and liabilities of shipowners and shippers of goods, in respect of cargo, may be considered according to their relation to (a) its loading; (b) its carriage on the voyage; (c) its delivery at its destination.

(a) *Loading of Cargo*.—As already seen under AFFREIGHTMENT, the shipowner is bound to provide a ship that is seaworthy for the particular cargo which she is to carry (*Stanton v. Richardson*, 1872, L. R. 7 C. P. 421, and 9 C. P. 390, wet sugar, Bovill, C. J., and Brett, J.), that has no peculiar defect which is injurious to cargo (*Tattersall v. Nav. S. Co.*, 1884, 12 Q. B. D. 297, such as being infected with foot-and-mouth disease; and under the Contagious Diseases Acts a vessel must be cleansed and disinfected before taking in cargo, as well in those parts of her where cattle have not been stowed as those where they have, *Ismay v. Blake*, 1892, 8 T. L. R. 277; *The Brig Carlotta*, 1877, 3 Asp. 456 (U. S.), smelling of petroleum and infested by rats); though a mere suspicion of unfitness for cargo, due to carrying a particular kind of goods as ballast, does not make the ship unseaworthy for this purpose (*Towser v. Henderson*, 1850, 19 L. J. Ex. 163). See SEAWORTHINESS. The ship must be ready to receive the cargo at the usual place for loading such cargo; if there are several such loading-places she must go to the one at which the charterer has the option of loading; but this option must be exercised reasonably by him. The master is bound to give notice when the ship is ready to load (*Stanton v. Austin*, 1872, L. R. 7 C. P. 651). The cargo must be brought alongside the ship (see ALONGSIDE), and delivered by the shipper to the servants of the shipowner, whose responsibility for it begins from that moment (*British Col. S. Co. v. Nettleship*, 1868, L. R. 3 C. P. 499). "The ship must be completely ready in all her holds" (Lopes, J., *Groves v. Volkart*, 1884, 1 C. & E. 309), and the shipowner is liable for all risks and expenses in getting the cargo on board. If the cargo is to be taken from the shore "at ship's risk and expense, and in ship's boats," the exceptions in the charter-party protect the shipowner from liability for loss during the transit of the goods to the ship (*Nottebohm v. Richter*, 1886, 18 Q. B. D. 63). The ship must provide everything that is necessary for taking the cargo on board, and is responsible for the proper dunnage required for it (*The Oquendo*, 1878, 3 Asp. 561; *The Cressington* [1891], Prob. 152); and, as a general rule, for the proper stowage of the goods (Willes, J., *Blaikie v. Stemberidge*, 1859, 6 C. B. N. S. 894); unless the charterer can be considered to have agreed to the manner of stowage by being on board and seeing it done (*Hovill v. Stephenson*, 1830, 4 Car. & P. 469), or by being warned as to the manner in which the goods were to be carried (*Major v. White*, 1835, 7 Car. & P. 41), or if the stowage has been done by a stevedore of the charterer (*Blaikie v. Stemberidge*, ante; *The Catherine Chalmers*, 1875, 32 L. T. 847, where the words were "stevedore appointed by charterer but paid by and acting under captain's order," and "cargo stowed by charterer's stevedore at expense and risk of vessel," respectively). The appointment of a stevedore by the charterer to superintend the stowage will not, however, relieve the shipowner from his duty in this respect, if the charter-party provides that the stevedore is to be appointed at the expense and under the inspection and responsibility of the master for proper stowage (*The Helene*,



1866, L. R. 1 C. P. 234), or "that the charterer is not to be liable for improper stowage" (*Sack v. Ford*, 1862, 32 L. J. C. P. 12). Bad stowage by the shipowner through ignorance of the nature of the goods fixes no liability on him (*Hutchinson v. Guion*, 1858, 5 C. B. N. S. 149); nor does damage resulting from the dangerous nature of the goods, whether the shipper of them knows of it or not (*Brass v. Maitland*, 1856, 6 El. & Bl. 470), though the shipper does not warrant the fitness of the goods in such a case (*Acatos v. Burns*, 1878, 3 Ex. D. 282). The shipowner is bound generally by the words of the charter-party to take a full cargo, and is not excused by fear of a peril excepted in the charter-party (*Atkinson v. Ritchie*, 1809, 10 East, 530; 10 R. R. 372). In a dock or bar harbour he is bound to take as much cargo as will allow him to cross the sill or bar at the highest available tide (*The Curfew* [1891], Prob. 131); and in a charter-party with the clause "as near thereto as she can safely get," the loading may have to be done outside the bar (*Shield v. Wilkins*, 1850, 5 Ex. Rep. 304). The charterer cannot insist on an improper manner of stowage being adopted in order to carry a bigger cargo (*Mackill v. Wright*, 1888, 14 App. Cas. 106), or on goods being stowed in any but the usual parts of the hold (*The Oquendo*, *ante*, not the forescuttle, *Furness v. Tenant*, 1892, 8 T. L. R. 336, not the lazarette and alley-ways), or in the cabin. See CABIN. And a guarantee of "ship to carry 90,000 cubic feet, or 1500 tons dead weight of cargo" is a warranty not that the ship shall carry that amount of the kind of cargo which the charterer was entitled to tender under the charter-party, but only a warranty of the carrying capacity of the ship (*Carnegie v. Conner*, 1889, 24 Q. B. D. 45), though if a certain cargo is contemplated, such a guarantee means a guarantee to carry so many tons of that cargo (*Mackill v. Wright*, *ante*). Special provisions are made for dangerous cargoes (M. S. A. ss. 446-450). The master may not stow cargo on deck, "the deck being *prima facie* an improper place for the stowage of cargo or any part of it" (Tindal, C. J., *Gould v. Oliver*, 1840, 2 Myl. & Cr. 208), except by custom of trade or the contract allowing it (*Dixon v. Roy, Ex A. C.*, 1886, 12 App. Cas. 11). Deck cargoes of timber in the winter to ports in the United Kingdom are prohibited, and grain cargoes in bulk in British ships can only be carried with certain precautions (M. S. A. ss. 451, 452; *The Rothbury*, 1888, 13 P. D. 119).

The charterer or shipper is bound to have the cargo ready, either on the quay where the ship is to be loaded, or at a usual storing place (*Carver*, 252). "The undertaking of the merchant to furnish a cargo is absolute" (Lord Blackburn, *Postlethwaite v. Freeland*, 1880, 5 App. Cas. 620), and is not excused by the fact of its becoming impossible for him to get one (*Kirk v. Gibbs*, 1837, 27 L. J. Ex. 209, act of Peruvian Government; *Blight v. Page*, 1810, 3 Bos. & Pul. 295 n., act of Russian Government; *Barker v. Hodgson*, 1814, 3 M. & S. 267, pestilence at Gibraltar; *Hills v. Sugru*, 1846, 15 Mee. & W. 253, no such cargo obtainable at the place of loading). Special exceptions are generally introduced into the contract to excuse him for delay in loading, *e.g.* "frost" (*Kay v. Field*, 1882, 10 Q. B. D. 241; *Grant v. Coverdale*, 1884, 9 App. Cas. 470, inapplicable, as place of loading was not frozen); "weather permitting" (*Stephens v. Harris*, 1887, 57 L. J. Q. B. 203); "strikes, accidents" (*Fenwick v. Schmalz*, 1868, L. R. 3 C. P. 313, snow is not an accident); "civil commotions" (*The Village Belle*, 1874, 30 L. T. 232); and the burden of proving the applicability of the exception is in the charterer (*ibid.*). The words "restraints of princes and rulers, political disturbances, and impediments during the voyage" have been held to cover delay at Iquique owing to a civil war in Chili, and the railway (the only means of bringing the cargo

(nitrate) to the port) being in the hands of the troops, as well as a delay owing to a demand at another port by the *de jure* Government for export duties on the nitrate which had already been paid to the *de facto* Government at Iquique (*Smith & Service v. Rosario Nitrate Co.* [1894], 1 Q. B. 174). If the loading is once finished, the merchant's obligation is at an end (*G. S. N. C. v. Slipper*, 1862, 31 L. J. C. P. 185; *Strugnell v. Friederichsen*, 1862, 12 C. B. N. S. 452).

The merchant charterer usually engages to load "a full and complete cargo, not exceeding what the ship can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture" (Carver, 261). Under these words, he must load as much cargo as the ship can properly carry. Loading goods of a tonnage equal to the ship's tonnage, as described in the charter-party, is not enough, *e.g.* a ship "of 261 tons or thereabouts," which can carry 400 tons, has not a full cargo if she has only 260 tons on board (*Hunter v. Fry*, 1819, 2 Barn. & Ald. 421; 21 R. R. 340; *Thomas v. Clarke*, 1818, 2 Stark. 450; 20 R. R. 714). "A full and complete cargo, say about 1100 tons," does not require more than that to be loaded though she can carry 100 tons more (the words being "words of expectation" only), but 1080 tons are not enough where a full cargo will be about 1133 tons (*Morris v. Levison*, 1876, 1 C. P. D. 155); the word "about" allowing a margin of 3 per cent. (*ibid.*), or 10 per cent. (*Alcock v. Leew*, 1883, 1 C. & E. 98), or 5 per cent. (*The Resolven*, 1893, 9 T. L. R. 75). "If the ship can only carry less than the amount mentioned, the undertaking of the charterer is fulfilled by loading a complete cargo" (Brett, J., *Morris v. Levison*, *ante*; and so *Rotherfield S. S. Co. v. Tweedie*, *ante*). The cargo shipped must reasonably comply with the terms of the charter-party, and be in a fit state to be put on board (*Holman v. Dasnières*, 1886, 2 T. L. R. 480 and 607). Where various articles are mentioned in the charter-party, the charterer may load a full cargo of any of them although less freight is thus got. Thus the words, "oats or other lawful merchandise at 4s. 6d. for oats, and if any other cargo be shipped to pay in full and fair proportion thereto according to London-Baltic printed rates," were held to make only the freights payable which were actually earned for carrying flax, codilla, and tow, articles specified in the London-Baltic rates (*Southampton S. C. C. v. Clarke*, 1868, L. R. 4 Ex. 78 and 6 Ex. 53). So under a charter-party to load "copper, tallow and hides,\* and other goods," the charterer was held justified in shipping only tallow and hides, though ballast in consequence had to be taken by the ship (*Morrison v. Page*, 1814, 4 Camp. 103). Where by charter-party freight was to be paid of "5s. 6d. a barrel of flour, meal, and naval stores, and 11s. a quarter of 480 lbs. of Indian corn or other grain," oats were held liable to pay at the former rate and not at the latter, which was inapplicable to them owing to their weight (*Warren v. Peabody*, 1849, 19 L. J. C. P. 43). Where a charter-party provided that the ship should take a full cargo at "an average rate of freight of 40s. a ton, and at least nine cabin passengers' passage money, £75," the charterers were not allowed to fill up the requisite amount of cargo by shipping steerage passengers and thereby make up the requisite freight, the word "cargo" *prima facie* relating to goods only (*Lewis v. Marshall*, 1844, 7 Mac. & G. 729). A full cargo must not leave empty spaces, or as they are called "broken stowage," unless there is a custom justifying doing so (*Cuthbert v. Cumming*, 1855, 24 L. J. Ex. 198 and 310, charterer allowed by Trinidad custom to pack sugar and molasses in hogsheads and puncheons; *Duckett v. Satterfield*, 1868, L. R. 3 C. P. 227, "a full cargo of sugar or other lawful produce . . . with sufficient bags for broken stowage," held to allow

charterer to ship cotton and put stone on board for ballast and no bags of sugar at all); in the absence of custom, the charterer must fill up such spaces (*Cole v. Meek*, 1864, 33 L. J. C. P. 183). And if, by the charter-party, a cargo of "any lawful merchandise, say 5000 to 5600 tons," is to be loaded, and the shipowner guarantees "5000 to 5600 tons space," and the charterer leaves 901 tons space unloaded out of the 5450 actually provided by the ship, the shipowner is entitled to freight of 5450 tons space (*Potter v. New Zealand S. C.*, 1895, 1 Com. Cas. 114), for if a wool cargo had been carried, as was intended, the full space would have been filled (*ibid.* 11 T. L. R. 502). If there is a usual way of preparing goods for shipment, the words "full and complete cargo" must be construed with reference to it (*Benson v. Schneider*, 1827, 7 Taun. 273, full cargo of cotton at New Orleans must be one of cotton re-pressed before loading; *Haynes v. Halliday*, 1831, 7 Bing. 587, deck to be taken out of a boat sent for carriage in a ship). The cost of preparing the goods for loading generally falls on charterer (*Cockburn v. Alexander*, 1848, 18 L. J. C. P. 74). Cargo loaded under a charter-party can be reclaimed by the charterer unless the master has given bills of lading for it which have got into the hands of third parties (*Davidson v. Gwynne*, 1810, 12 East; 381, 11 R. R. 420; *Thompson v. Small*, 1845, 14 L. J. C. P. 157); but cannot be, if loaded on board a general ship, except on payment of freight and an undertaking to indemnify the master (*Tindall v. Taylor*, 1845, 24 L. J. Q. B. 12; *Thompson v. Trail*, 1826, 2 Car. & P. 334).

(b) *Sea Carriage of Cargo*.—The shipowner, as already seen, is absolutely responsible for the safe conveyance of the cargo to its destination, except in so far as he limits his responsibility by contract; and the master, as his agent, is bound to take proper care of it, and take all the necessary steps for preserving it from danger and damage. Thus where goods which were contraband of war were shipped for carriage from London to Yokohama, and on the ship's arrival at Hong Kong war was declared between China and Japan, and there were several Chinese warships in and about Hong Kong, the master was held justified under his duty to take care of the cargo in not carrying it on to Yokohama, but landing it at Hong Kong (*Nobel's Explosives Co. v. Jenkins* [1896], 2 Q. B. 326). He cannot insist on carrying the cargo on in order to earn his freight, when it is found to be damaged at an intermediate port and must deteriorate considerably unless it is dried or reconditioned at that port (*Willes, J., Notara v. Henderson*, 1872, L. R. 7 Q. B. 235; Ex. Ch.) But it has not been settled what amount of effort the master is bound to make, or what amount of delay on the voyage he is to incur for the sake of the cargo or may be only a part of it. If the delay would be insignificant and the expense trifling, and there would be no special risk, trouble, inconvenience, or other objection, it seems that he is bound to wait and recondition the goods (*Carver*, 293). Besides this general duty of care of the cargo as servant of the shipowner, the master is in case of emergency or necessity invested with an implied authority from the owner of the goods to deal with it in the way that is best for its interest (*The Gratitude*, 1801, Wh. & T. M. C., Lord Stowell). Thus he may incur expenses to preserve it, and has a lien on it for those expenses (*Hingston v. Wendt*, 1876, 1 Q. B. D. 367); but he must, if possible, before doing so communicate with the cargo-owner; and the cargo-owner is only liable for expenses incurred on behalf of the cargo (*Cargo ex Argos*, 1873, L. R. 5 P. C. 134). The master may save the more valuable part of a cargo before the rest (*Royal Mail S. S. Co. v. English Bank of Rio*, 1887, 19 Q. B. D. 375 and 376, Wills, J.). He may also sell the goods in order to save

their value if they are in a perishing state and it is impossible to carry them on; but in order to justify his doing so he must show that such a sale was urgently necessary, and that it was impossible for him to get instructions from the cargo-owner (*Cannan v. Meaburn*, 1823, 1 Bing. 243; *Australasian S. N. C. v. Morse*, 1872, L. R. 4 P. C. 222; *Acatos v. Burns*, 1878, 3 Ex. D. 282). It makes no difference whether the cause of the cargo becoming perishable is its own vice or anything else (*Acatos v. Burns*, *ante*). "A sale is the last thing that the master should think of, because it can only be justified by that necessity which supersedes all human laws. If he sells without necessity, his owners as well as himself will be answerable to the merchant; and they will be equally answerable if he places the goods at the disposal of a Vice-Admiralty Court in a British colony, and they are sold under an order of the Court, such Court having no authority to order a sale. And persons who buy under such circumstances will not acquire a title as against the merchant, but must answer to him for the value of the goods. The merchant should be consulted if possible" (Abbott, 5th ed., 343 and 344). "The general rule is that the master is authorised by the owners of the cargo only to convey the goods to the port of discharge, and that nothing but necessity can authorise him to adopt any other course of action" (James, L. J., *Atlantic I. C. v. Huth*, 1880, 16 Ch. D. 474); and accordingly though he decide prudently and in good faith to sell the cargo, that will not justify it unless it is also necessary (*ibid.*). An unjustifiable sale of cargo does not transfer the property in it (*Freeman v. East India Co.*, 1822, 5 Barn. & Ald. 617; 24 R. R. 497; *Morris v. Robinson*, 1824, 3 Barn. & Cress. 196, sale made under the order of a Vice-Admiralty Court); and the master or owner or the purchaser will be liable in such case for the goods or their value (*Trouson v. Dent*, 1853, 8 Moo. P. C. 419; *Atlantic I. C. v. Huth*, *ante*); except that the purchaser will not be so liable if the sale is justified by the law of the country where it takes place; for "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere" (*Cammell v. Sewell*, 1860, 5 H. & N. 728, 746; *Castrique v. Imrie*, 1870, L. R. 4 H. L. 429, per Blackburn, J., and Keating, J.). The "necessity" justifying such sale has been defined as "the force of circumstances which determine the course a man ought to take. When, by the force of circumstances, a man has the duty cast upon him of taking some action for another, and under that obligation adopts the course which, to the judgment of a wise and prudent man, is apparently the best for the interest of the person for whom he acts in a given emergency, it may properly be said of the course so taken that it was in a mercantile sense necessary to take it" (Sir M. Smith, *Australasian I. C. v. Morse*, *ubi sup.*, p. 230). "Purchasers of a cargo from a master cannot justify the sale unless it is established that the master used all reasonable efforts to have the goods conveyed to their destination, and that he could not by any means available to him carry the goods or procure them to be carried to their destination as merchantable articles, or could not do so without an expenditure clearly exceeding their value after their arrival at their destination" (Cotton, L. J., *Atlantic I. C. v. Huth*). He may also sell the cargo to raise funds for the repair of the ship; this is a "forced loan from the goods-owner," which must be repaid either at the value fetched at the port where the goods were sold or at the value they would have had at their destination if the ship arrives there, and at the value for which they actually sold at the port of refuge if the ship does not arrive (*Atkinson v. Stephens*, 1852, 21 L. J. Ex. 319; *Hopper v. Burness*, 1876, 1 C. P. D. 137).

A more difficult question arises when the ship is so much damaged on the voyage that she cannot continue it at all or without such repairs as will delay her for a very long time, as to what is then the duty of the shipowner towards the cargo-owner. The law on this point is thus stated by Lord Tenterden: "If by reason of the damage done to the ship, or through want of necessary materials, she cannot be repaired at all, or not without great loss of time, the master is at liberty to procure another ship to transport the cargo to the place of destination; but if his own ship can be repaired he is not bound to send the cargo by another, but may detain it till the repairs are done and can hypothecate it for the expense of them, that is, supposing it is not of a perishable nature; if it be of such a nature and there be not time or opportunity to consult the merchant, he ought either to tranship or sell it, according as one or the other is most beneficial to the merchant. . . . The disposal, however, of the cargo by the master is a matter that requires the utmost caution on his part. He should always bear in mind that it is his duty to convey it to the place of destination; this is the purpose for which he has been entrusted with it, and this purpose he is bound to accomplish by every reasonable and practicable method. . . . The master must act as a wise and prudent man for the benefit of all concerned. Some regard may be allowed to the interest of the ship and of its owners, but the interest of the cargo must not be sacrificed to it. Transhipment for the place of destination if it be practicable is the first object, because that is in furtherance of the original purpose; if that be impracticable, return or a safe deposit may be expedient (*Liddard v. Lopes*, 1809, 10 East, 526; 10 R. R. 368)." This statement of the law is borne out by the course of subsequent decisions. Thus it has been held that a master is not bound as against the cargo-owner to repair the ship if the cost of repairing her exceeds her repaired value and the freight which she would earn (*De Cuadra v. Swann*, 1864, 16 C. B. N. S. 772). If, on the other hand, the ship can be repaired without prejudice to the shipowner, he is bound to carry the cargo on; for "he is bound to carry the goods to their destination if not prevented by some event which he has not occasioned and over which he has no control" (Lord Denman, *Shipton v. Thornton*, 1838, 9 Ad. & E. 333). "The master is bound by his contract to carry goods to their destination in his own ship. If that ship is disabled and cannot be repaired at all, or cannot be repaired in time to save a perishable cargo, he is empowered if not bound to send on the cargo in another bottom" (Jervis, C. J., *Rosetto v. Gurney*, 1851, 11 C. B. 176). This would seem to be the true rule, and not that suggested by Cockburn, C. J., that "the disablement of the ship absolves the shipowner from his contract to carry the goods, and he is not bound to repair for the purpose of carrying on the cargo, nor having repaired does he become bound to reship the cargo and complete the voyage under the original contract; but if bound to do so at all is bound only under that contract as modified by the altered circumstances" (*Atwood v. Sellar*, 1879, 4 Q. B. D. 342); and in *Seendsen v. Wallace*, 1885, 10 App. Cas. 469, Lord Blackburn disapproves of "this opinion that in all cases where the ship is disabled, whether she can be repaired or not, the original contract is dissolved and a new one formed by law." The shipowner is at any rate at liberty to tranship whether it is his duty to do so or not, and can get his agreed freight under the contract, even though he tranships at a lower rate of freight (*Shipton v. Thornton*, ante), and even where he has to pay a higher rate of freight (*ibid.*, and so *The Norden*, *Shipping Gazette*, April 1894); but he will not bind the cargo-owner to pay such freight without being entitled to set off against it advances which he has made against the original freight (*Matthews*

*v. Gibbs*, 1860, 30 L. J. Q. B. 55), or to pay freight on a greater amount of cargo than is actually on board (*Gibbs v. Grey*, 1857, 26 L. J. Ex. 286). Where he tranships he does so as agent of the shipowner and not of the cargo-owner (*Matthews v. Gibbs, ante*); he cannot therefore charge for his services if they are not beyond his ordinary duty as master in protecting and transshipping the cargo (*The Glenmanna*, 1860, Lush. 122); and the shipowner's risks and liabilities under the original contract continue during the conveyance of the goods in the substituted ship (*The Bernina*, 1886, 12 P. D. 36). If the voyage is abandoned the freight is lost, and if the ship is abandoned and the cargo is saved by salvors, no freight is payable (*The Kathleen*, 1874, L. R. 4 Ad. & Ec. 269; *The Cito*, 1881, 7 P. D. 9). And it has lately been held that when a shipowner has agreed by the charter-party that his ship shall proceed to a port of discharge, and there deliver the cargo unless prevented by the excepted perils, and the ship has to put into a port of refuge for repairs, the shipowner is liable in damages for abandoning the voyage at that port without the consent of the charterers, unless the effect of the excepted perils proves to have been such as to make it either physically impossible to complete the voyage, or so clearly unreasonable as to be impossible in a business point of view (*Assicurazioni Generali v. S. S. B. Morris Co.* [1892], 2 Q. B. 652). The master has a reasonable time allowed him for deciding what he will do—abandon, repair, or tranship (*The Soblomsten*, 1866, L. R. 1 Ad. & Ec. 293; *The Blenheim*, 1885, 10 P. D. 167). The liability of the cargo in respect of general average, salvage, and bottomry will be found under AVERAGE; SALVAGE; BOTTOMRY.

(c) *Delivery of Cargo*.—In bills of lading the port of delivery is usually named; in charter-parties it is often left uncertain, and the shipowner may contract to discharge in certain countries or a certain area, generally at a "safe port" named by the charterer. Such port must be named in a reasonable time, or the captain can go to another port named in the charter-party (*Sieveling v. Maas*, 1856, 25 L. J. Q. B. 275). It must be physically safe for the ship when loaded, though not necessarily so at once when she arrives there, for a temporary obstacle will not exempt the shipowner from going there (*Parker v. Winlo*, 1857, 7 El. & Bl. 942, where there was a clause, "so near thereto as she can safely get"); and if the master has signed bills of lading for a port, he cannot afterwards say it is not safe (*Capper v. Wallace*, 1880, 5 Q. B. D. 163, where there was a similar clause to the above); and generally the charter-party provides that the ship shall be able to discharge "always afloat" (*Smith v. Treglia*, 1896, 12 T. L. R. 363; see ALWAYS AFLOAT). It must be politically safe (*Ogden v. Graham*, 1861, 31 L. J. Q. B. 26), but the master cannot refuse to take the ship to a port which is not actually so unsafe (*The Teutonia*, 1872, L. R. 4 P. C. 171). The contract may be qualified by a clause in the charter-party that the ship shall go to the named port or so near thereto as she may safely get, which gives the shipowner more scope (see SO NEAR THERETO, etc.). There may be several places in the named port which are proper for delivery, and the charter-party may provide for delivery "at the usual place of discharge and according to the custom of the port." The charterer may then, it seems, order the ship to go to which place is most convenient to him (*The Felix*, 1868, L. R. 2 Ad. & Ec. 273), even after the ship has gone to another customary place and incurred expense thereby; but in a similar case it has been held that the ship after getting to one such customary place was not bound to go to another (*The Norway*, 1864, B. & L. 377, 400). And the ship may have by such custom to discharge at several places in the same port (*The Alhambra*, 1881, 6 P. D. 74; *Nielson v. Wait*, 1885, 16 Q. B. D. 67), though this makes

lightening of the cargo necessary. If the charterer has an option, he must exercise it reasonably where there are several such places, and not choose one which will entail delay (*Dahl v. Nelson*, 1880, 6 App. Cas. 44, Lord Blackburn), unless the charter-party leaves his option quite unfettered (*Bulman v. Fenwick* [1894], 1 Q. B. 179). The manner of the discharge follows the practice of the port, and may be in the open water, at a wharf, or in a dock, on to a wharf, or into lighters (Carver, 461). The shipowner may deliver in any customary manner, but he cannot insist on adopting one mode which entails charges on the merchant instead of one which is convenient to the merchant: e.g. if the shipowner puts the cargo on to the wharf instead of the merchant's lighters alongside, and incurs wharfage charges, the merchant is not liable for them (*Bishop v. Ware*, 1813, 3 Camp. 360; 14 R. R. 755), unless there is a custom of the port regulating the discharge of particular ships or cargoes (*Marzetti v. Smith*, 1884, 49 L. T. 580, where a contract "to deliver from ship's tackle" was held to be consistent with a custom in the Victoria Docks to discharge on to the quay and thence into lighters, instead of into lighters directly; *Petrocochino v. Bott*, 1874, L. R. 9 C.P. 355, where the charter-party provided for "delivery from ship's deck, where shipowner's liability shall cease," and a bale of goods was lost between the quay, where the officials of the same docks put the goods for the ship, and the merchant's lighter, the shipowner was held not liable; and in *The Clan Macdonald* (1883, 8 P. D. 178), a similar custom in the East and West India Docks was not established). As a general rule, the charterer or consignee of the cargo must take the cargo from the rail of the ship (*Kearon v. Redford*, 1895, 11 T. L. R. 227, Kennedy, J.), and provide the proper appliances and men for doing so. "The merchant binds himself on the ship arriving at the place of delivery to take the cargo from alongside, and for that purpose to provide the proper appliances for taking delivery there" (Lord Blackburn, *Dahl v. Nelson*, *ubi sup.*, p. 43). "The duty of providing and making proper use of sufficient means for the discharge of cargo when the ship which has been chartered arrives at its destination and is ready to discharge, generally lies on the charterer" (Lord Selborne, *Postlethwaite v. Freeland*, 1880, 5 App. Cas. 595). The charterer is liable for any delay in this respect which is not accounted for by the custom of the port and that is not referred to in the charter-party (*Wright v. New Zealand S. Co.*, 1878, 4 Ex. D. 165). Where no time is specified in the bill of lading or charter-party within which the consignee is to discharge the cargo, his obligation is to do so within a reasonable time under the actual circumstances of the case, provided that these circumstances in so far as they involve delay have not been caused or contributed to by the consignee (*Hick v. Raymond* [1893], App. Cas. 22). And for the rights and duties of the shipowner and merchant generally as regards the unloading of the ship, see DEMURRAGE.

The duties of the shipowner are to discharge the cargo out of the ship, and to supply the men and appliances required: this is generally done by the ship's crew either alone or with additional hands to help them. In docks governed by the Harbours, Docks, and Piers Clauses Act, 1847, shipowners may employ their own lumpers to discharge the cargo, unless the contract provides otherwise (*Dick v. Badart*, 1883, 5 Asp. 49). The discharge is generally jointly done by shipowner and consignee, the latter's part beginning when the cargo is brought to the rail of the ship (*Budgett v. Binnington* [1891], 1 Q. B. 38, Lord Esher, M. R.); but the shipowner is bound not only to put the cargo on the rail of the ship, but also in such a position that the consignee can take delivery of it (*Petersen v. Freebody*, 1895, 11 T. L. R. 459, Lord Esher). "If the ship is to be unloaded in the usual and customary

manner, the master and crew are to take that part which, by the custom of the port, falls on them, and the freighter shall do the rest" (Blackburn, J., *Ford v. Cotesworth*, 1868, L. R. 4 Q. B. 177). The shipowner must separate the goods so as to give delivery to the separate consignees, but he need not subdivide the parcels of goods for their convenience (*Claccrich v. Hutcheson*, 1887, 15 Sess. Ca. (4th) 11). His responsibility for the cargo generally ends when he has delivered it at the ship's side, or on the quay (Carver, 462, quoting Buller, J., *Hyde v. Trent Nav. Co.*, 1793, 5 T. R. 389; 2 R. R. 620). If the consignee sends lighters, the shipowner's liability ends when the cargo is put into them, unless by custom the ship is bound to take care of them till they are fully loaded; and his liability will cease from that time (*Catley v. Wintringham*, 1792, 1 Pea. 202; 3 R. R. 670; *Robinson v. Turpin*, 1805, 1 Pea. 203 n.); and it would seem that if there is a custom for him to do anything more for the cargo, he must have notice of it (Carver, 462). See ALONGSIDE.

The master is not bound to notify the arrival of the ship to the consignee of cargo: whether the ship be a general one (*Harman v. Clarke*, 1815, 4 Camp. 159 and 161; 16 R. R. 768; *Houlder v. General Steam N. Co.*, 1862, 3 F. & F. 170 and 174, Cockburn, C. J.), or a chartered one (*Nelson v. Dahl*, 1879, 12 Ch. D. 583, Brett, L. J.), though he must publicly notify it in the usual way. If the consignee does not appear to take delivery of it, the master should wait either for the time fixed by the charter-party or bill of lading; or if no time is so fixed, then for a reasonable time. If the contract stipulates that delivery shall be taken "immediately" or "directly," the consignee must do so promptly; but if the bill of lading says that delivery is to be taken "simultaneously with the ship being ready to unload," and the consignee is not ready to take it till a quarter of the consignment has been landed on the wharf, the shipowner is not justified in discharging the other three quarters on the wharf when he is not prejudiced by the consignee's default, and thereby putting him to the expense of wharfage (*Wilson v. London, etc., Steam N. Co.*, 1866, L. R. 1 C. P. 61, Willes, J.). He must generally deliver personally to the consignee or his agents in order to fulfil his contract (*Gatcliffe v. Bourne*, 1838, 3 Bing. N. C. 314; 1841, 3 Mac. & G. 643; 1844, 11 Cl. & Fin. 45), unless that is excused by the custom of the port (*Wardell v. Mourillyan*, 1799, 2 Esp. 695, common hoyman according to custom delivering at a wharf; *Petrocochino v. Bott*, ante, delivery on a dock company's wharf; *The Emilien Marie*, 1875, 32 L. T. 435, delivery to a master porter at Liverpool); and generally delivery must be made to the holder of the bill of lading and of the proper goods (see BILLS OF LADING).

Delivery may be made to another carrier who is going to carry the cargo on, and in that case, though the contract provides that the liability of the first carrier ceases "when the goods are delivered from the ship's deck," he still remains liable on his contract to make a proper contract for their carriage on the second stage (*Moore v. Harris*, 1876, 1 App. Cas. 318).

If the consignee fails to take delivery at the time stated or on the ship's arrival, the shipowner can keep the goods on board for a reasonable time on demurrage, or can land and warehouse the cargo. In the latter case, at common law he still continues liable for them as a carrier (*i.e.* at all risks), and cannot change his responsibility into that of a warehouseman only (*i.e.* only liable for loss by his own negligence), unless there is an arrangement between the parties or a custom of trade to that effect (*Hyde v. Trent Nav. Co.*, ante; *In re Webb*, 1818, 3 Taun. 443; 20 R. R. 520; *Garside v. Trent Nav. Co.*, 1792, 4 T. R. 581; 2 R. R. 468; *Mitchell v. L. and Y. Ry. Co.*, 1875, L. R. 10 Q. B. 256). If, however, the consignee refuses to take delivery, or fails to do so within a reasonable time, the shipowner may



warehouse the goods and assume only a warehouseman's responsibility for them (*Hudson v. Baxendale*, 1857, 27 L. J. Ex. 93; *Meyerstein v. Barber*, 1866, L. R. 1 C. P. 54, Willes, J.). The master will not by so doing generally preserve his lien on the cargo for freight or other charges, though he will still have an action for them; but it seems that he can do so if the goods are warehoused in a warehouse over which the master or the consignee of the ship has exclusive control, or in a public bonded warehouse (see BONDED WAREHOUSE), in which, by local law, the goods can be put subject to the lien (*Meyerstein v. Barber*, *ante*; *Mors le Blanch v. Wilson*, 1873, L. R. 8 C. P. 227; *Erichsen v. Barkworth*, 1858, 3 H. & N. 899). This is still the law with regard to warehousing at foreign ports.

So far, however, as goods imported into the United Kingdom are concerned, the master of a ship is now specially empowered by statute to land and warehouse them, on the consignee failing to take delivery within the time mentioned in the contract of carriage, or if no time is mentioned, within seventy-two hours, excluding Sundays and holidays, from the time that the ship is reported, and to preserve his lien on them for freight and other charges, by delivering them to the wharf or warehouse owner with a notice in writing that they are to remain subject to a lien for a fixed sum in respect of such charges and lien; such lien is not discharged till a receipt for that sum, or a release of freight, is produced to the warehouseman, or till the owner of the goods deposits with the warehouseman a sum of money equal to the amount of the stop; such deposit, in the absence of notice given within fifteen days after its being made by the goods-owner to retain it, and stating the amount which he admits is due thereout to the shipowner, can be paid by the warehouseman to the shipowner. If such notice is given, the warehouseman is to apprise the shipowner of it, and pay or tender to him the amount admitted to be due to him by the goods-owner, and shall retain the rest for thirty days from the date of the notice, and then, if no legal proceedings have been taken by the shipowner or notice given to the warehouseman, the latter can return the rest of the money to the goods-owner. If the lien is not discharged, and no deposit is made, the warehouseman, after giving due notice by advertisement, may, and must, if required by the shipowner, sell the goods by public auction at the end of ninety days from the time when they were placed in his custody, or sooner, if they are perishable, at his discretion. The proceeds of sale are applied to payment of duties if sold for home use, sale expenses, warehouseman's expenses, shipowner's claim for freight and charges, and the balance goes to the goods-owner (Merchant Shipping Act, 1894, ss. 492-501, Part vii.). The Act also provides as regards the manner of taking delivery of the goods that, if the owner of the goods offers to take delivery before the goods are landed, his entry is to be preferred to that of the shipowner (s. 493 (3)); if the goods, for convenience in assorting them, have been landed at the wharf where the ship discharges, and the goods-owner offers to take delivery of them, they are to be delivered to him in twenty-four hours after assortment, and the shipowner bears the expense of landing and assorting them (4). If the owner of the goods offers, and is ready to take delivery of the goods at a wharf other than that at which the ship discharges before the goods are landed, and the shipowner does not deliver to him then, or inform him when the goods can be delivered, the shipowner must give him and his warehouseman twenty-four hours' notice before he delivers them, or does so at his own risk and expense (5). The decisions on the statute (or its predecessors) are to the effect that the default of the consignee need not be wilful in order to justify the shipowner (*The Energie*,

1875, L. R. 6 P. C. 306): that where goods are landed under (4) subs. (5) is not applicable, and that if the shipowner fails to give the statutory notice, the consignee is bound to take away the goods in a reasonable time (*The Clan Macdonald*, 1883, 8 P. D. 178); that under (5) the goods-owner must be in a condition to take delivery when he asks for it (*Beresford v. Montgomery*, 1864, 34 L. J. C. P. 41), and the shipowner is not justified (if he is not prejudiced), because the consignee fails to take delivery till after part of a cargo has been landed, in insisting on landing the rest at the expense of the consignee (*Wilson v London, etc., Steam N. C., ante*); the sum fixed by the master in his claim against the goods must not exceed the amount really due (*The Energie, ante*); if a consignee for sale of the goods, whose name is mentioned in the bill of lading, but who has no property in the goods, has deposited a sum equal to the freight and charges with the warehouseman, he is not personally liable for the freight to the shipowner (*White v. Furness, Withy, & Co.* [1895], App. Cas. 40). The shipowner may contract himself free from the Act, and land the goods free of the notices and conditions required by it (*Oliver v. Colven*, 1879, 27 W. R. 822).

Whether the shipowner is responsible for the right delivery of goods after they are warehoused is doubtful. In *Glyn v. East and West India Dock Co.* (1880, 6 Q. B. D. 475), Brett, L. J., thought he was not; Baggallay, L. J., that he was; and in the House of Lords, Lord Blackburn said, "The dock company (warehousemen) did not hold the goods by virtue of any contract, but under the statute, subject to a duty imposed by the statute to deliver them to the person to whom the shipowner was bound to deliver them; and they were justified, or rather excused, by anything which would have justified or excused the master in so delivering them." The warehouseman's liability in this respect is thus the same as the shipowner's would be; but the shipowner is perhaps not responsible for the safety of the goods in the warehouse (*Meyerstein v. Barber, ante*, Willes, J.).

[See WAREHOUSEMEN; SHIP; FREIGHT; Abbott, *Shipping*; MacLachlan, *Shipping*, 4th ed.; Carver, *Carriage by Sea*; Scrutton, *Charter-Parties and Bills of Lading*.]

**Caricature.**—See DEFAMATION.

**Carnal Knowledge.**—See RAPE.

**Carrier** (for Carrier by Sea, see CARGO; PASSENGERS).

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1. *Common Carrier.*—A person who holds himself out as a carrier of the goods of all persons who think fit to employ him for hire, is a common

carrier of such goods as he publicly professes to carry (*Johnson v. Midland Railway*, 1849, 4 Ex. Rep. 367; *Dickson v. Great Northern Railway*, 1886, 18 Q. B. D. 176). Whether it is necessary that the carrier should undertake to carry between fixed termini in order to become a common carrier is not finally settled. The better opinion seems to be that this is not the case (see 1 Smith, L. C., 9th ed., p. 199; Macnamara on *Carriers*, Ch. iii.; *Liver Alkali Co. v. Johnson*, 1874, L. R. 7 Ex. 267; 9 *ibid.* 338). In the case last cited the Court of Exchequer held that a person who carries, but not between fixed termini, may be a common carrier. The Exchequer Chamber, on appeal, decided the case on other grounds (see below, and see further *Scaife v. Farrant*, 1875, L. R. 10 Ex. 358; and *Nugent v. Smith*, 1876, 1 C. P. D. 423).

A carter, or furniture remover, who makes a bargain for each job (*Scaife v. Farrant*, 1875, L. R. 10 Ex. 358), or a barge owner who lets his barges by the job (*Liver Alkali Co. v. Johnson*, 1874, L. R. 9 Ex. 338), is not a common carrier. Railway and canal companies are common carriers only of such goods as they profess to carry (*Johnson v. Midland Railway*, 1849, 4 Ex. Rep. 367; *Dickson v. Great Northern Railway*, 1886, 18 Q. B. D. 176).

A common carrier is bound, not only to carry safely (below, 3.), but to carry for all comers (below, 2.). Every carrier who actually receives goods for carriage for hire without limiting his liability in respect to them, is under the same obligation to carry safely, that is to insure the safety of the goods, as if he were a common carrier (see the cases cited above). For example, a lighterman who lets out barges to carry by the job (*Liver Alkali Co. v. Johnson*, *supra*), or a shipowner who carries goods without a bill of lading (*q.v.*) (*Hill v. Scott* [1895], 2 Q. B. 371) is liable for loss of the goods without proof of negligence.

2. *Duty to Carry.*—A common carrier must carry all goods of the description which he professes to carry (see above, 1.) that are tendered to him for carriage, without insisting upon any unreasonable condition (*Garton v. Bristol and Exeter Railway*, 1861, 1 B. & S. at p. 162; *Great Western Railway v. Sutton*, 1868, L. R. 4 H. L. 226), provided that he have accommodation for the goods (*Jackson v. Rogers*, 1683, 2 Show. 327), and reasonable payment for their carriage is offered (*Wyld v. Pickford*, 1841, 8 Mee. & W. 443), and the sender is ready and willing to pay it (Bullen and Leake, 3rd ed., p. 277), and also provided that the goods are brought neither too late for the journey by which they are to go (see *Pickford v. Grand Junction Railway*, 1844, 12 Mee. & W. 766), nor too long a time before the journey is to begin (*Lanc v. Cotton*, 1701, 1 Raym. (Ld.), at p. 652; see *Great Western Railway v. Bunch*, 1888, 13 App. Cas. 31, and below, *Passengers' Luggage*). But the carrier may (apparently) refuse to take goods which will subject him to exceptional danger (*Edwards v. Sherratt*, 1801, 1 East, 604; per Hale, C. J., *Morse v. Slue*, 1672, 1 Vent. 238).

Unless he has otherwise agreed, he must deliver within a reasonable time having regard to the circumstances of the case (*Taylor v. Great Northern Railway*, 1866, L. R. 1 C. P. 385; *Hales v. London and North-Western Railway*, 1863, 4 B. & S. 66); as to damages for late delivery, see below, 13. He need not necessarily go by the shortest road, if he professes to go, and it is usual to go by another (*Myers v. London and South-Western Railway*, 1870, L. R. 5 C. P. 1). And he is not bound to take any extraordinary steps to prevent delay by accidents of the journey, such as a fall of snow (*Bridson v. Great Northern Railway*, 1858, 28 L. J. Ex. 51).

3. *Duty to Carry safely.*—A common carrier (and any person who actually carries goods for hire without limiting his liability by agreement, see above, 1.) is liable for all loss of or damage to the goods delivered to him for carriage.

unless it be due to the act of God (*q.v.*) or of the Queen's enemies (subject to the special limitations of his liability stated below), even though the goods be stolen from him by an overwhelming force (*Southcote's case*, 43 Eliz. 4 Co. Rep. 83, b; *Morse v. Sluc*, 1672, 1 Vent. 190, 238; per Holt, C. J., in *Coggs v. Bernard*, 1703, 2 Raym. (Ld.), at p. 918). By the "act of God" is meant an overwhelming accident (*Oakley v. Portsmouth Steam Packet Co.*, 1856, 11 Ex. Rep. at p. 623), which could not have been prevented by any amount of foresight and pains and care reasonably to be expected from the carriers (*Nugent v. Smith*, 1876, 1 C. P. D. 423), such as an extraordinary tempest.

The common law exceptions just mentioned are only available to exempt the carrier from liability if he has provided a fit and safe carriage (*Amies v. Stevens*, 1718, 1 Stra. 128), or, where the transit is by water, a seaworthy and watertight boat (*Lyon v. Mells*, 1804, 5 East, 428; 7 R. R. 726), and has followed the usual route to the destination of the goods, and endeavoured to deliver them according to the usual course, or according to his agreement (*Davis v. Garrett*, 1830, 6 Bing. 716).

As injury to goods by negligence is a wrong apart from contract, the owner of the goods may sue in tort (*Kelly v. Midland Railway* [1895], 1 Q. B. 945, and cases there cited).

4. *Duration of Liability, Receipt of the Goods, Delivery.*—The goods come into the carrier's charge so that he becomes liable for them as a common carrier, as soon as they are delivered for transit to him, or to his authorised agent, as, for instance, the person in charge of his usual booking-office (*Colepepper v. Good*, 1832, 5 Car. & P. 380; Carriers Act, 1830, s. 5), or wharf (*British Columbia Co. v. Nettleship*, 1868, L. R. 3 C. P. 499). Delivery to a porter by a person who knows that the ordinary course is to deliver at a receiving office, has been held not to be a delivery to the railway company (*Slim v. Great Northern Railway*, 1854, 14 C. B. 647). A carrier is not compellable to receive the goods and mind them for an unreasonable time before the journey begins (see above, 1.). So a railway porter at a station where cloak rooms are provided has no authority to receive luggage for an unreasonable time, having regard to the ordinary course of the traffic, before a passenger's train starts (*Great Western Railway v. Bunch*, 1888, 13 App. Cas. 31.).

The carrier's liability ends with actual delivery to the consignee, or at his address if the carrier is bound to deliver (*Duff v. Budd*, 1822, 3 Brod. & B. 177; 23 R. R. 609). So that it is not determined by delivery by the carrier to his sub-contractor, or other carrier employed by him to complete the carriage, if he has booked through to the end (*Muschamp v. Lancaster and Preston Railway*, 1841, 8 Mee. & W. 421; *Crouch v. Great Western Railway*, 1857, 2 H. & N. 491), unless the contract of carriage limits the carrier's liability to his own line or part of the route. If the goods are to be fetched from the carrier's station or warehouse, his liability as a common carrier ceases after a reasonable time for the consignee to fetch them away, and the carrier is afterwards liable for default or negligence as a bailee only (*Bourne v. Gatliffe*, 1841, 3 Man. & G. 643; 7 *ibid.* 850; 11 Cl. & Fin. 45; *Mitchell v. Lancashire and Yorkshire Railway*, 1875, L. R. 10 Q. B. 256; *Chapman v. Great Western Railway*, 1880, 5 Q. B. D. 278), notwithstanding that he has refused delivery under his lien for freight (see below, 14.). And in such case the carrier is not bound by any general rule to give the consignor notice of the consignee's failure to fetch or take up the goods unless the special circumstances of the case call for such notice (*Hudson v. Bazendale*, 1857, 2 H. & N. 575), but only to do what is reasonable under the circumstances (*Crouch v. Great Western Railway*, 1857, 2 H. & N. 491).

See further STOPPAGE IN TRANSITU. Goods received by a railway company in their cloak room are received by them as carriers, so as to give them a lien, and (*semble*) to subject them to the liability to insure safety (*Singer Manufacturing Co. v. L. and S. W. Railway* [1894], 1 Q. B. 333).

The place of delivery in the absence of agreement is the address of the consignee (*Hyde v. Trent and Mersey Navigation Co.*, 1793, 5 T. R. 389; 2 R. R. 620; *Duff v. Budd*, 1822, 3 Brod. & B. 177; 23 R. R. 609; *Golden v. Manning*, 1773, 2 Black. W. 916; *M'Kean v. M'Ivor*, 1870, L. R. 6 Ex. 36), or to the consignee's order (*London and North-Western Railway v. Bartlett*, 1861, 7 H. & N. 400; *Cork Distilleries Co. v. G. S. and W. Railway Co.*, 1874, L. R. 7 H. L. 269), unless the usual course of the carrier's business is to deliver at some place from which the goods are to be fetched.

If delivery is refused by the consignee, the carrier can recover the expenses of warehousing from the consignor (*Great Northern Railway v. Swaffield*, 1874, L. R. 9 Ex. 132).

5. *Limitation of Liability, Special Contract, The Carriers Act, 1830.*—A carrier who is not subject to the provisions of the Railway and Canal Traffic Acts (see below, 7.), might at common law, and may still limit his liability for loss or damage by contract with the owner or sender of the goods,—subject to his obligation to carry goods of the kind he professed to carry without imposing unreasonable conditions (*Crouch v. London and North-Western Railway*, 1854, 14 C. B. 255, and see above, 2.),—even for loss or damage due to the gross negligence of the carrier or of his servants (*Carr v. Lancashire and Yorkshire Railway*, 1852, 7 Ex. Rep. 707; see the opinion of Blackburn, J., in *Peck v. North Staffordshire Railway*, 1863, 10 H. L. 473). Before the Carriers Act, 1830, carriers often endeavoured to limit their liability by public notices exhibited at their stations or receiving offices or placed on their tickets or receipts, or otherwise published, and after much litigation it was settled that such notices, if brought to the notice of the owner or sender of the goods in any particular case before he sent the goods (*Kerr v. Willan*, 1817, 6 M. & S. 150; 18 R. R. 337; *Walker v. York and North Midland Railway*, 1853, 2 El. & Bl. 750), constituted a contract limiting the carrier's liability in the same manner as an express contract between the parties would have limited it (see the opinion of Blackburn, J., cited above, in which the history of this branch of the law will be found admirably stated).

If the carrier gives the consignor a ticket or receipt which has conditions of carriage printed upon it, and the consignor sends the goods, knowing that the conditions are there (*Watkins v. Rymill*, 1883, 10 Q. B. D. 178, and cases there cited), whether he troubles to read them or not (*Parker v. South-Eastern Railway*, 1877, 2 C. P. D. 416), provided the carrier have done what is reasonably sufficient to give him notice of the conditions (*Richardson v. Rowntree*, [1894], App. Cas. 217), he will be taken to have agreed to the conditions, and they form a special contract modifying the carrier's common law liabilities. If the consignor will not agree to the conditions, and the carrier is bound to carry the goods tendered (see above, 2.), but refuses to waive the conditions, the consignor's remedy is to sue the carrier for refusing to carry (*Carr v. Lancashire and Yorkshire Railway*, 1852, 7 Ex. Rep. 707).

The conditions on a ticket or receipt are not such a public notice or declaration as is made of no effect by the Carriers Act (see below, 4.) (*Walker v. York and North Midland Railway*, 1853, 2 El. & Bl. 750).

The Carriers Act, 1830, 11 Geo. iv. and 1 Will. iv. c. 68, provides that no common carrier by land for hire shall be liable for loss of, or injury to, "any gold or silver coin of this realm, or of any foreign State, or any gold or

silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or timepieces of any description, trinkets, bills, bank-notes of Great Britain or Ireland, orders, notes, or securities for payment of money, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace" (not including machine-made lace, 28 & 29 Vict. c. 94), or any of them contained in any parcel or package, which shall be delivered to be carried for hire, or to accompany the person of any passenger by a public conveyance, when the value of the property exceeds £10, *unless* at the time of delivery for carriage the value and nature of the property shall have been declared by the sender or deliverer, and the increased charge according to a scale, which is notified as required by the Act (s. 2), shall have been paid, or (if the credit is given for it) promised (s. 1) (if demanded, *Behrens v. Great Northern Railway*, 1862, 7 H. & N 950). The scale of increased charges for parcels containing any of the specified goods, and of a value exceeding £10, must be notified by a notice in legible characters (*Clayton v. Hunt*, 1811, 3 Camp. 27), fixed in a conspicuous place in the carrier's receiving house (s. 2), and the carrier must give a receipt for the payment of the increased charge when required to do so, or he loses the benefit of the Act (s. 3). The Act extends to injuries and losses occasioned by gross negligence of the carrier's servants (*Hinton v. Dibbin*, 1842, 2 Q. B. 646), but it does not protect him from liability to answer for loss of or injury to goods arising from their felonious acts (s. 8) (*Metcalf v. London and Brighton Railway*, 1858, 4 C. B. N. S. 311; *Stephens v. London and South-Western Railway*, 1886, 18 Q. B. D. 121), or the felonious acts of the servants of sub-contractors carrying for him (*Machu v. London and South-Western Railway*, 1848, 2 Ex. Rep. 415). It does not annul or affect any special contract for the conveyance of goods (s. 6, contracts by the ticket or receipt are special contracts, see above), but it provides that no *public notice* or *declaration* shall limit or affect the liability at common law of any such common carriers, in respect of any articles or goods to be carried by them; but all such common carriers shall be liable, as at common law, to answer for the loss of, or injury to, any articles or goods, in respect whereof they may not be entitled to the benefit of the Act, any public notice or declaration by them made and given contrary thereto in any wise limiting such liability notwithstanding.

6. *Inherent Vice, Contributory Negligence.*—The carrier is not liable for any loss or damage to the goods which occurs owing to their inherent vice, or to their deterioration from natural causes to which he has not contributed (see ANIMALS, vol. i. p. 257, and *Blover v. Great Western Railway*, 1872, L. R. 7 C. P. 655, there cited). But he will be liable if the loss is primarily due to his want of care in not remedying an obvious defect, or taking reasonable steps to diminish the loss, for instance, by stopping a leak in a cask (*Beck v. Evans*, 1812, 16 East, 244; 14 R. R. 340; *Stuart v. Crawley*, 1818, 2 Stark. N. P. 323; 20 R. R. 691; *Notara v. Henderson*, 1872, L. R. 7 Q. B. 225). So the carrier is absolved from liability if the loss is primarily due to the negligence of the sender, as if he send a dog with an insecure collar (*Richardson v. North-Eastern Railway*, 1872, L. R. 7 C. P. 75), or goods in a condition requiring special treatment without giving the carrier notice (*Baldwin v. London, Chatham, and Dover Railway*, 1883, 9 Q. B. D. 582), or goods improperly packed (*Stuart v. Crawley*, *supra*).

7. *Railways and Canals, Limitation of Liability.*—The Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, was passed to put an end, so

far as railways and canals are concerned, to the system the companies had adopted of limiting their liability by notices upon their tickets and receipts, or given to their customers, which, when brought home to the senders of goods, constituted special contracts (see above, 5., and the opinion of Blackburn, J., in the case next cited). The Act does not alter or affect the rights or liabilities of any company under the Carriers Act, 1830, with respect to the goods therein enumerated (s. 7, and see above, 5.), but as to other classes of goods, and cases not falling within the last-mentioned Act, it provides that every railway and every canal company shall be liable for loss of, or injury to, goods in the receiving, forwarding, or delivery thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration limiting such liability, and every such notice, condition, or declaration in any wise limiting such liability shall be void. But nothing in the Act is to prevent the said companies from making such conditions in respect to the receiving, forwarding, and delivering of any goods as shall be adjudged by the *Court* or *judge* before whom any question relating thereto shall be tried to be just and reasonable, provided that (*Peck v. North Staffordshire Railway*, 1863, 10 H. L. 473) the conditions are embodied in a special contract made (*Scottish Central Railway v. Ferguson*, 1864, 2 Sess. Ca. 3 Ser. 781) and signed by the sender, or the person delivering the goods to the company, or the sender's agent (s. 7). The company's receiving agent may be the sender's agent for the purpose, if he is authorised to sign on the sender's behalf (*Aldridge v. Great Western Railway*, 1864, 15 C. B. N. S. 582).

The Act only applies to loss or injury occasioned by neglect or default; it consequently leaves a company at liberty to make conditions by any special contract, as at the common law, without restriction as to signature or reasonableness, as regards loss or injury occasioned by an accident occurring without the default or neglect of the company or its servants. It has been held that "default" means default in the nature of negligence, and consequently that theft by one of the company's servants is not within the Act, unless it be due to the negligence of another servant, so the company could escape liability for such a theft, under cover of a condition brought home to the sender of the stolen goods, and thereby constituting a contract between the company and the sender (see above, 5.) (*Shaw v. Great Western Railway* [1894], 1 Q. B. 373), but *quære*.

The section only applies to carriage over a company's own line (*Zuns v. South-Eastern Railway*, 1869, L. R. 4 Q. B. 539) (and vessels belonging to or chartered or worked by it, Railway and Canal Traffic Act, 1888, s. 28), so that if a company agrees for through carriage it may make a contract, not subject to the conditions of the section, limiting its liability in respect of such part of the carriage as is conducted over another company's line (s.c.; *Kent v. Midland Railway*, 1874, L. R. 10 Q. B. 1).

The question whether a condition is just and reasonable is to be decided by the judge, and is subject to appeal. There are many reported decisions as to what conditions are and what are not allowable (see *Roscoe N. P.*, 16th ed., p. 613, and Macnamara on *Carriers*, pp. 149-158); a condition against liability, except for wilful default or neglect, to be submitted to in consideration of carriage at a reduced rate, is usually treated as reasonable (*M. S. and L. Railway v. Brown*, 1883, 8 App. Cas. 703; *Great Western Railway v. McCarthy*, 1887, 12 App. Cas. 218); and, on the other hand, a condition against all liability unless an *ad valorem* insurance rate be paid, which would make the freightage for short distances very heavy, is unreasonable (*Peck v. North Staffordshire Railway*, 1863, 10 H. L. 473;

*Dickson v. Great Northern Railway*, 1886, 18 Q. B. D. 176). See, as to the *onus* of proof under the former condition, *Curran v. Midland G. W. of Ireland*, 1896, 2 Ir. R. 183.

8. *Through Carriage by Rail or Canal and Sea*.—Where a railway company contracts for the through carriage of goods, partly by rail or canal and partly by sea, a condition exempting the company from liability for loss or damage to the goods at sea, occasioned by the act of God (*q.v.*) or of the Queen's enemies, by fire, accidents of machinery or steam, or any other dangers or accidents of the seas, rivers, or navigation, if published in the booking-office in a conspicuous manner, and legibly printed on the receipt or freight note is valid as a special contract with the consignor (Regulation of Railways Act, 1868, s. 14). Where a railway company sub-contract for the carriage of passengers or goods by sea, they are liable as though they were carrying them in their own vessels (Regulation of Railways Act, 1871, s. 12). The provisions of the Railway and Canal Traffic Act, 1854, s. 2 (next referred to below), as to forwarding traffic, and equal treatment of customers, and of the Regulation of Railways Act, 1873, s. 14, as to the publication of rates, have been extended to through traffic carried for a railway company at sea (Railway and Canal Traffic Act, 1888, s. 28).

9. *Railways and Canals, Obligation to Carry all Traffic, to Carry without Partiality*.—A railway or canal company is bound to afford due and reasonable facilities (see the *Windsford Local Board v. Cheshire Lines Committee*, 1890, 24 Q. B. D. 456) for receiving and forwarding traffic without unreasonable delay (Railway and Canal Traffic Act, 1854, s. 2), including through traffic (Railway and Canal Traffic Act, 1888, s. 25). "Traffic" means passengers, their luggage, and animals, and all other goods which can be sent by rail or canal, except specially dangerous kinds of goods (see Railway Clauses Act, 1845, s. 105), so that besides the goods a company undertakes to carry, of which it is a common carrier, it must provide for and carry all other "traffic." It is not liable as an insurer of such other traffic, but only, as a bailee for hire, in respect of loss or injury to it, which is occasioned by the wilful default or negligence of its servants (*Dickson v. Great Northern Railway*, 1887, 18 Q. B. D. 176), and it may limit such liability by a special contract under sec. 7 of the Railway and Canal Traffic Act, 1854 (above, 7.).

The company must carry for all its customers, without undue preference for any person or particular description of traffic (Railway and Canal Traffic Act, 1854, s. 2). Its charges must be equal for goods of the same description (Railway Clauses Act, 1845, s. 90; Railway and Canal Traffic Acts, 1854, s. 2; 1888, s. 27). It cannot therefore charge a specially high rate for a package made up of parcels intended to be redelivered separately by the consignee (*Great Western Railway v. Sutton*, 1868, L. R. 4 H. L. 226; *Baxendale v. Eastern Counties Railway*, 1858, 4 C. B. N. S. 63). In any case of inequality of rates the burden of proving that no undue preference is given is thrown upon the company; and it is provided that no difference shall be made in the treatment of home and foreign merchandise for the same service (Railway and Canal Traffic Act, 1888, s. 27). But different places may be grouped together, and a uniform freight charged from them all (Railway and Canal Traffic Act, 1888, s. 29). These regulations do not compel a railway company to allow credit to all its customers, merely because it allows credit to some of them (*Goddard v. London and South-Western Railway*, 1874, 1 Rail. 308), but it must not give credit to a rival trader for the purpose of



injuring the complainant (*s.c.*), and the regulations do not prevent the company charging a lower rate to customers who can guarantee full loads (*Nicholson v. Great Western Railway*, 1858, 5 C. B. N. S. 366, and see *Baxendale v. Great Western Railway*, *ibid.* p. 309). The meaning of the Acts is that a person is not to be obliged to pay one sort of remuneration for services which the company performs for other traders, either for a less sum or for nothing (per Lord Cairns in *London and North-Western Railway v. Evershed*, 1878, 3 App. Cas. 1029). Therefore where a railway company, in order to attract the custom of a trader who had a siding to another company's line, charged him at a cheaper rate for carriage than it charged the plaintiff, the plaintiff was entitled to recover the amount of the difference between the cheaper rate and his own rate which he had paid (*s.c.*).

The companies are bound to give particulars of their charges, distinguishing the terminal charges and dock charges (if any) from those in respect of conveyance (Railway Regulation Act, 1868, s. 17; Railway and Canal Traffic Act, 1888, s. 33 (3)). The jurisdiction to deal with questions of unequal treatment and failure to afford facilities for traffic is now vested in the Railway Commissioners (Railway and Canal Traffic Act, 1888, ss. 8-14). See generally RAILWAY and RAILWAY AND CANAL COMMISSION.

10. *Passengers, Duty to Carry safely.*—For the duty to carry passengers, see above, 9. A railway company must, so far as human care and foresight can go, provide for the safe carriage of its passengers, but it is not a common carrier of passengers, and does not warrant their safety. So if a tyre breaks owing to a latent defect which is not practically (*Richardson v. Great Eastern Railway*, 1876, 1 C. P. D. 342) discoverable until actual breakage (*Readhead v. Midland Railway*, 1869, L. R. 4 Q. B. 379), or if the train of another company having running powers over its lines, and solely by the fault of the other company's engine-driver, runs into one of its trains (*Wright v. Midland Railway*, 1873, L. R. 8 Ex. 138), and its passengers are injured, the carrying company is not responsible. The liability for injuries occasioned by failure from the high standard of care exacted for the safety of passengers extends to accidents which take place upon a foreign line over which the train is running, and also to accidents occasioned by the negligence of owners of the foreign line and their servants, who, by analogy to the law of through bookings for goods, are treated as sub-contractors for whom the carrying company are responsible (*Blake v. Great Western Railway*, 1862, 7 H. & N. 987). In the last case the company whose servant's negligence caused the injury would be liable in tort. Generally the liability, in respect of a railway accident due to negligence, can be put either in tort or in contract (see above, 3.; *Kelly v. Metropolitan Railway* [1895], 1 Q. B. 944), but in some cases where the plaintiff has no contract with the defendant company, he can sue for damages in tort (*Berringer v. Great Eastern Railway*, 1879, 4 C. P. D. 163); for example, a child for whom no ticket has been taken (*Austin v. Great Western Railway*, 1867, L. R. 2 Q. B. 442), or a trespasser (see *Barnes v. Ward*, 1850, 9 C. B. at p. 420).<sup>\*</sup> But a passenger travelling gratis on the terms that he does so at his own risk cannot recover for an injury due to negligence (*McCawley v. Furness*, 1872, L. R. 8 Q. B. 57; *Gallin v. London and North-Western Railway*, 1875, L. R. 10 Q. B. 212).

The company is bound to provide usual and proper platforms at its stations and at places where passengers are "invited to alight," or to warn passengers of the absence of such platforms so as to prevent accidents. As to what constitutes an invitation to alight, see *Bridges v. North London*

*Railway*, 1874, L. R. 7 H. L. 213; *Lewis v. London, Chatham, and Dover Railway*, 1873, L. R. 9 Q. B. 66; *Rose v. North-Eastern Railway*, 1876, 2 Ex. D. 248; and *Foulkes v. Metropolitan Railway*, 1880, 5 C. P. D. 157. In the last-mentioned case the plaintiff was held to be entitled to recover from the defendants in respect of injuries sustained by falling from one of their trains which was drawn up at an unsuitable platform belonging to and situate on the line of another company over whose line the defendants had running powers. The plaintiff had taken his ticket from the other company, but they had a pooling arrangement with the defendants. The Court of Appeal held that the defendants having permitted the plaintiff to travel by their train were bound to make provision for his safety.

11. *Passengers' Luggage*.—A railway company is bound to afford reasonable facilities for forwarding luggage (see above, 9.; *Munster v. South-Eastern Railway*, 1858, 4 C. B. N. S. 676) by ordinary, but not by cheap excursion trains (*Runsey v. North-Eastern Railway*, 1863, 14 C. B. N. S. 641). Luggage includes clothing and things used for personal convenience or comfort (*Shepherd v. Great Northern Railway*, 1852, 8 Ex. Rep. 30; *Hudson v. Midland Railway*, 1869, L. R. 4 Q. B. 366), but not bedding (*Macrow v. Great Western Railway*, 1871, 6 Q. B. 612), or documents of title (*Phelps v. London and North-Western Railway*, 1865, 19 C. B. N. S. 321), or a rocking-horse (*Hudson v. Midland Railway*, 1869, L. R. 4 Q. B. 366). The company is responsible as a common carrier for luggage taken into the carriage with the passenger, except so far only as any loss or damage to it is due to the passenger's interference with the company's exclusive control of it (*Bergheim v. Great Eastern Railway*, 1878, 3 C. P. D. 221). But the company is not liable as a common carrier in respect of luggage given to a porter an unreasonable time before the starting of the train (*Great Western Railway v. Bunch*, 1888, 13 App. Cas. 31), or after a reasonable time from the arrival of the passenger at his destination (*Hodgkinson v. North-Western Railway*, 1884, 14 Q. B. D. 228).

A third party may recover damages for the negligent injury to, or destruction of, his property which a passenger was carrying as luggage (*Meux v. Great Eastern Railway* [1895], 2 Q. B. 387). As to cloakroom conditions respecting the care of and liability for luggage, see the cases upon contracts by ticket conditions above, 5., and *Harris v. Great Western Railway*, 1876, 1 Q. B. D. 515; *Parker v. South-Eastern Railway*, 1877, 2 C. P. D. 416; and *Henderson v. Stevenson*, 1875, 2 H. L. Sc. App. 470.

12. *Timekeeping*.—As regards goods carried by carriers as common carriers, see above, 2. As regards all traffic carried by railway and canal companies (including passengers, see above, 9.), the obligation of providing reasonable facilities for forwarding it (see above, 9.) requires the company to carry and deliver within a reasonable time. An announcement of a train in a time-table is, if there is nothing more, a contract with anyone who takes a ticket, that it will duly start (*Denton v. Great Northern Railway*, 1856, 5 El. & Bl. 860) and arrive at intermediate stations and the terminus within a reasonable time, not necessarily at the advertised time (*Hurst v. Great Western Railway*, 1865, 19 C. B. N. S. 310, see next case). Most railway companies expressly state in the time-tables they issue that they will not undertake to keep to the advertised times, but will do their best to do so. See, for the interpretation of such conditions, *Le Blanche v. London and North-Western Railway*, 1876, 1 C. P. D. 286; *McCartan v. North-Eastern Railway*, 1885, 54 L. J. Q. B. 441; *Woodgate v. Great Western Railway*, 1884, 51 L. T. 826. Where a condition was taken to mean that the company would use every reasonable effort to keep time, evidence of long and unusual delay

of a train was held to be presumptive evidence of a breach of the undertaking (*Le Blanche v. London and North-Western Railway*, 1876, 1 C. P. D. 286). The damages for such a breach do not extend to loss due to an illness contracted in walking home (*Hobbs v. London and South-Western Railway*, 1875, L. R. 10 Q. B. 111), or to the cost of a special train ordered to avoid the tedium of a few hours' delay (*Le Blanche v. London and North-Western Railway*, 1876, 1 C. P. D. 286). As to damages by late delivery of goods, see next section.

13. *Damages by Loss of Goods, or Delay in Delivery.*—The damages where goods are wholly lost or destroyed is the market value of the goods at their intended destination (*Rice v. Baxendale*, 1861, 7 H. & N. 96; *British Columbia Sawmill Co. v. Nettleship*, 1868, L. R. 3 C. P. 499). The measure of damages is the natural result of, that is the result that might be expected to flow in the ordinary course from, the loss or delay (*Hadley v. Baxendale*, 1854, 9 Ex. Rep. 341). In the case cited, a mill shaft, intended to be used as a pattern for a new shaft, was delivered to the defendants for carriage, with notice that the mill was stopped. There having been delay in delivery of the shaft in consequence of which the mill actually remained stopped for some days longer than would otherwise have been the case, the plaintiffs claimed the loss of profit as damages. The case was argued on the footing that if the consequence of delay had been sufficiently brought to the notice of the carriers they would have been liable for the damages claimed, but the Court held there was in fact no such sufficient notice. It is doubtful whether notice is sufficient to fix a carrier with liability for extraordinary damages in cases where he is bound to carry the goods, and cannot be considered to have contracted to undertake any special liability (see *Horne v. Midland Railway*, 1873, L. R. 8 C. P. 131, which also was determined upon insufficient notice in fact). But special damages have been given upon the ground of notice, e.g. loss through non-arrival in time for exhibition (*Simpson v. London and North-Western Railway*, 1876, 1 Q. B. D. 274; *Jameson v. Midland Railway*, 1884, 50 L. T. 426). See also 2 Smith, *Leading Cases*, 10th ed., p. 525; and *Ebbetts v. Conquest* [1895], 2 Ch. 377; [1896], App. Cas. 490. The damages for late delivery may include loss due to a fall in the market (*Wilson v. London and Yorkshire Railway*, 1861, 9 C. B. N. S. 632; *Collard v. South-Eastern Railway*, 1861, 7 H. & N. 79). See generally as to damages, the notes to *Vicars v. Wilcocks* in 2 Smith, *Leading Cases*, pp. 523 *et seq.*

14. *Carrier's Lien.*—A carrier is entitled, apart from special contract, to a lien upon the goods delivered to him for carriage for the freight (*Skinner v. Upshaw*, 1702, 2 Raym. (Ld.) 752). It is not a general lien, and does not extend to charges for warehousing (*Somes v. British Empire Shipping Co.*, 1860, 8 H. L. 338; *Great Northern Railway v. Swaffield*, 1874, L. R. 9 Ex. 132), but is a lien upon each parcel for the freight due in respect of it (*Rushforth v. Hadfield*, 1805, 6 East, 519; 7 East, 224; 8 R. R. 520), and a stipulation for a general lien is unreasonable (*Scottish Central Railway v. Ferguson*, 1864, 2 Sess. Ca. 3 Ser. 781). The lien extends to the property of a third person delivered for carriage without the owner's authority (*Exeter Carrier's case* cited in *Yorke v. Grenaugh*, 1702, 2 Raym. (Ld.) 867; cp. an innkeeper's lien on a stranger's property, *s.c.* *Robins v. Gray* [1895], 2 Q. B. 501).

See generally as to the subject of this article, the section in *Ruling Cases*, and Macnamara on *Carriers*, to both of which the writer is indebted. See also RAILWAY; RAILWAY COMMISSION; SHIP.

*Carrier, Offences by.*—At common law misappropriation by a carrier of goods intrusted to him was breach of trust only and not larceny. But by

sec. 3 of the Larceny Act, 1861, 24 & 25 Vict. c. 96, the defence of bailment to an indictment for larceny was taken away and larceny by a carrier or other bailee was put in the same position as simple larceny (*R. v. Davies*, 1866, 10 Cox C. C. 239). If the carrier receives the price of the goods and misappropriates, he is equally guilty (2 Russ. on *Crimes*, 6th ed., 1840).

Where the carrier is given money to buy goods and instructed to carry them back, he is liable for larceny if he misappropriates the goods (*R. v. Bunkall*, 1863, 33 L. J. M. C. 75).

**Carrier (by Sea).**—See CARGO; PASSENGERS.

**Cartel Ship**, a ship used between belligerents under a Cartel (*q.v.*).

**Cartels** are conventions between belligerents, which, being considered of an administrative rather than political character, are not subject to the ordinary formalities of solemn compacts between States.

Properly speaking, the term is applied to all arrangements for intercourse between belligerents or the manner in which any such derogations from the extreme rights of war shall be carried out. In recent practice it has been used more particularly of agreements for the treatment or liberation of prisoners, the reception of messengers, truce-bearers, etc., between hostile armies, and postal and telegraphic communication, when such communication is allowed to continue (see Hall, *International Law*, pp. 428 and 570; Calvo, *Dict. du droit Intern.*, word "Cartel").

**Case.**—See ACTION ON THE CASE.

**Case Stated.**—See SPECIAL CASE.

**Cash.**—Cash means the actual coin of the country, or bank-notes of the Bank of England, which are part of the currency and are treated as equivalent to coin (*Miller v. Race*, 1758, 1 Burr. 452). See BANK-NOTE (3).

• It passes by mere delivery (*ibid.*), and so cannot be followed by a former owner in fraud of whom it is paid away, if paid to a creditor of the payer who has no notice of the fraud (*Thomson v. Clydesdale Bank* [1893], App. Cas. 282). But as between a trustee's creditors and his *cestuis-que trust*, the latter are allowed to follow trust money paid into the trustee's bank account without regard to the "rule in *Clayton's case*" (see *In re Hallett's Estate*, 1880, 13 Ch. D. 696, cited vol. i. p. 480; and APPROPRIATION OF PAYMENTS).

Payment in cash: the Companies Act, 1867 (s. 25), requires shares in a company to be paid for in cash unless a contract is registered. This has been interpreted to mean that either actual money must be paid, or there must be such a *bond fide* transaction between the company and the shareholder as would, if the company brought an action for calls, support a plea of payment (*Spargo's case*, 1873, L. R. 8 Ch. 407; see *In re Johannesburg Co.* [1891], 1 Ch. 119; and COMPANY).

As to the duty of a broker or other agent to obtain payment in cash, see **BROKER** and **PRINCIPAL AND AGENT**. As to payment by cheque, see **CHEQUE**. See generally, **PAYMENT**.

"Cash with option of bill": a stipulation for payment in these terms means that cash is to be paid unless the option to give a bill is exercised by the buyer, so that if a bill is refused the seller can sue for the price at once. But if the terms are "bill with option of cash," the seller cannot sue for the price until the bill, if given, would have fallen due. He can, of course, sue for damages for the refusal to give a bill at once (*Anderson v. Carlisle Horse Clothing Co.*, 1870, 21 L. T. 760; Benjamin on *Sale*, 4th ed., p. 715).

"Cash against bill of lading": a stipulation to this effect in a contract for the sale of goods is an indication of intention that the property in the goods shall not pass until after payment of the price, which in the absence of countervailing circumstances, is conclusive as to such intention (*Ogg v. Shuter*, 1875, L. R. 10 C. P. 159; 1 C. P. D. 47). In the case cited the Divisional Court held that the words were intended only to preserve the vendor's lien, but the Court of Appeal decided that the property did not pass.

"Cash or money so called": a bequest in these words by will was held not to pass bonds or promissory notes (*Beales v. Crisford*, 1843, 13 Sim. 592). Cash at the testator's bank was held to pass under a bequest of "all that I hold in the National Bank" (*Townsend v. Townsend*, 1877, 1 L. R. Ir. 180).

**Cassation**, in continental law, is the quashing of a judgment delivered by the highest Court which has jurisdiction in matters of fact, as opposed to questions of law. Thus the French Court of Cassation has jurisdiction only where a decision of the Court of Appeal is alleged to be contrary to law, or where the formalities prescribed by the laws of procedure have not been followed, or where a decision has been given by a Court not competent to deal with the issue (*ultra vires*), or where, upon the same issues and between the same parties, two Courts of Appeal have given different decisions.

**Casting Vote** is the term used to denote the final and decisive vote which the law in some cases allows the returning officer or chairman at an election, or the president or chairman at various meetings, to give in the case of an equality of votes.

With regard to parliamentary elections, the Ballot Act, 1872, 35 & 36 Vict. c. 33, s. 2, provides that, where an equality of votes is found to exist between any candidates at an election for a county or borough, and the addition of a vote would entitle any of such candidates to be declared elected, the returning officer, if a registered elector of such county or borough, may give such additional vote, but shall not in any other case be entitled to vote at an election for which he is returning officer. It will be observed that in this case the returning officer has a casting vote only if he is a duly registered elector; if he is not a duly qualified voter, it is his duty, in case of an equal number of votes being polled for two or more candidates, to return all such candidates (see 121 Com. Journ. 486).

At municipal and county council elections, on the other hand, the

returning officer, whether entitled to vote or not in the first instance, has a casting vote, it being provided by the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, that, at an election of councillors where an equality of votes is found to exist between any candidates, and the addition of a vote would entitle any of those candidates to be declared elected, the returning officer, whether entitled or not to vote in the first instance, may give such additional vote by word of mouth or in writing (s. 58, subs. 5).

At an election of aldermen, in case of an equality of votes, the chairman, although as an outgoing alderman, or otherwise, not entitled to vote in the first instance, has a casting vote (*ibid.*, s. 60, subs. 5).

So also at an election of a mayor, in case of equality of votes, the chairman, although not entitled to vote in the first instance, has the casting vote (*ibid.*, s. 61, subs. 4).

The returning officer, or deputy returning officer, who counts the votes, has a casting vote, if a parochial elector of the parish, at parish council elections (Parish Councillors Election Order, 1894, rule 31); at rural district council elections (Rural District Councillors Election Order, 1894, rule 21); at elections of guardians outside London (Guardians' Election Orders, 1894, rule 22); at elections of guardians in London (*ibid.*, rule 20); and at elections of metropolitan vestrymen, etc. (Vestrymen and Auditors (London) Election Order, 1894, rule 20). At urban district council elections also the returning officer, or deputy returning officer, who counts the votes, has a casting vote if he is a parochial elector of the district (Urban District Councillors Election Order, 1894, rule 21).

With regard to the meetings and proceedings of the council of a borough, the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, enacts that, in case of equality of votes, the chairman of the meeting is to have a second or casting vote (see s. 22, subs. 1, and sched. ii. rule 11).

As to the casting vote of the chairman at a general meeting of shareholders, see Companies Clauses Act, 1845, 8 & 9 Vict. c. 16, s. 76; at meetings of directors, *ibid.*, s. 92; at meetings of committees of directors, *ibid.*, s. 96.

**Casual Ejector.**—The fictitious defendant in the old form of the action of ejectment as it existed prior to the Common Law Procedure Act of 1852. See RECOVERY OF LAND, ACTION FOR.

**Casual Pauper.**—The term "casual pauper" is defined as "any destitute wayfarer or wanderer applying for or receiving relief" in the Pauper Inmates Discharge and Regulation Act, 1871, 34 & 35 Vict. c. 108, s. 3. As to "casual poor," see POOR LAW.

**Casus belli**, an occurrence viewed as a justification for war. An occurrence which interferes with the full enjoyment of the rights, or affects the independence, of a State, has generally been regarded as a justification for war. Where the dignity of a nation is concerned, or it has suffered an injury from another nation and has made representations to the offending nation to that effect, a *casus belli* may be considered to arise if the offending Power fails to give adequate redress. Solely to further the interests of a State is not a legitimate *casus belli*.

**Casus fœderis**, an, or the, event which, by the terms of a treaty of alliance, entitles one of the allies to help from the other or others.

**Cat, The**, is the instrument used for the flogging of prisoners over sixteen, sentenced by a Court to suffer that punishment. It may not be used unless specified in the sentence (26 & 27 Vict. c. 44. s. 1 (3)). It is also used for the flogging of convicted prisoners, when that punishment is ordered by the visiting justices under the Prison Acts, 1865 and 1877, and the General Prison Rules of 1878 (St. R. & O. Revised, vol. v. p. 664). These enactments do not apply to convict prisons such as Dartmoor or Portland.

It consists of a handle of wood or rope about eighteen inches long, to which are attached nine branches or tails of rope, with several knots on each. It must be of a pattern approved by a Secretary of State (Prison Rules of 1878, r. 58; St. R. & O. Revised, vol. v. p. 664). Its use for the punishment of persons subject to military law was restricted by the Mutiny Act of 1879, and in 1881 abolished by the Army Act, 44 & 45 Vict. c. 58, s. 44, except as to certain offenders in military prisons (s. 133 (2)). It is permitted, subject to restrictions, in the Royal Navy, by the Naval Discipline Act, 29 & 30 Vict. c. 109, ss. 52 (4), 53 (11), 55. See WHIPPING.

**Catching Bargains.**—1. *PRINCIPLE.*—The jurisdiction of Courts of Equity to set aside any transaction entered into by a person, who, from his youth, ignorance, or the pressure of his necessities, was unable to make a fair bargain with the other party, wherever the transaction is grossly one-sided and unfair by reason of such incapacity, is said to be one of the oldest heads of Equity (*O'Rourke v. Bolingbroke*, 1877, 2 App. Cas. 814; *Aylesford v. Morris*, 1873, L. R. 8 Ch. 484, per Lord Selborne), and it has not been in any way affected by the repeal of the usury laws (*l.c. c.*). Although a very great number of cases upon the subject have been reported (which may be found collected in the notes to *Chesterfield v. Janssen* in 1 White and Tudor, *Leading Cases*), it can hardly be said that the principle upon which the Court acts is now capable of much more precise definition than it received in Lord Hardwicke's judgment in the case last cited (1750, 2 Ves. 125). The third and the last heads of "frauds" which the Lord Chancellor there enumerated, were: fraud presumed from the circumstances and conditions of the parties contracting,—where surreptitious advantage is taken of the weakness or necessity of another; and catching bargains with heirs, reversioners, and expectants in the life of the fathers. In the last case, he said, fraud is inferred from the circumstances and conditions of the parties contracting,—weakness on one side and usury or extortion, or advantage taken of such weakness, on the other. "Where circumstances suggest an unconscientious use of power arising out of the relation of the parties, the defendant (on an application to set the transaction aside) must show that it was *fair, just, and reasonable*" (per Lord Selborne in *Aylesford v. Morris*, *supra*). And in one of the latest cases on the subject Kay, J., said, "The result of the decisions is, that where a purchase is made from a poor and ignorant man at a considerable under-value, the vendor having no independent advice, the Court of Equity will set aside the transaction" (*Fry v. Lane*, 1888, 40 Ch. D. 312).

The characteristic marks of such a transaction as the Court will set aside to be deduced from the passages cited above need not be all found together in every case. Two circumstances only are essential: (a) that the transaction

was unfair to the applicant, and (b) that, for some reason, the applicant was not in a position to negotiate on equal terms. The circumstances that the transaction was (c) entered into by a very young and inexperienced person, or (d) without the aid of a professional adviser, or (e) surreptitiously, are usually found to be present also, but they are, as will be seen, not indispensable.

(a) *Unfairness*.—The unfairness must be judged of in the case of a sale by reference to the market value of the property sold (*Tynte v. Hodge*, 1864, 2 Hem. & M. 287; *Edwards v. Burt*, 1852, 2 De G., M. & G. 55). And it must be judged of in any case as at the date of the transaction itself, and not according to subsequent events (*Gowland v. De Faria*, 1810, 17 Ves. 20; 11 R. R. 9; *Boothby v. Boothby*, 1849, 2 Mac. & G. 604). Thus in *O'Rorke v. Bolingbroke* (*supra*, see 2 App. Cas. at p. 835), where the application was to set aside a sale by the plaintiff of his reversion expectant on the death of his father, the turning-point of the case in the House of Lords was the fact that the purchaser at the time of the sale reasonably believed the father's life to be a good one.

Upon the sale of an interest in possession mere inadequacy of price is not sufficient to cause the Court to set the sale aside unless it is so great "as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition" (per Lord Westbury in *Tennent v. Tennents*, 1870, 2 Sc. App. 6; *Gwynne v. Heaton*, 1778, 1 Bro. C. C. at p. 9). The same rule is now applied to *bond fide* sales of reversions by the Act 31 & 32 Vict. c. 4. That Act provides that no purchase, contract, or assignment made *bond fide*, and without fraud or unfair dealing, of any reversionary interest, shall be set aside *merely on the ground of under-value*. It leaves the jurisdiction of the Court unaffected as regards all other grounds of interference, and does not shift the onus which formerly lay, and still lies, on the purchaser to establish the fairness of any transaction relating to the reversion, the circumstances of which raise a presumption of unfairness (*Aylesford v. Morris*, *supra*; *Beynon v. Cooke*, 1875, 1 L. R. 10 Ch. 391 n.; *O'Rorke v. Bolingbroke*, *supra*).

(b) *The Plaintiff not able to Negotiate on Equal Terms*.—See the passages cited at the head of this article. In almost all the cases where the transaction was set aside, the applicant had entered into it under the stress of urgent pecuniary necessity; but in one of the latest (*Kearns v. Joyce*, 1896, Ir. R. vol. i. 442), the judge found as a fact that, at the time of the mortgage the mortgagor was not suffering from any pecuniary pressure beyond that he was reckless and improvident, and ready to accept money on any terms to supply him with the means of dissipation. And notwithstanding this finding, he and the Irish Court of Appeal agreed that the transaction could not stand. There is no doubt that where advantage is taken of the reckless prodigality of a young spendthrift, that is sufficient to found the jurisdiction (see Lord Selborne's judgment in *Aylesford v. Morris*, *supra*; and *Nevill v. Snelling*, 1880, 15 Ch. D. 679). It is sufficient also if the vendor or mortgagor was an ignorant person and unacquainted with the value of his property (see *Fry v. Lane*, *supra*).

(c) *Youth of Vendor, etc.*—The circumstance that the plaintiff was young and inexperienced in business at the time is very material if present in the case (it is dwelt upon in nearly all the cases cited, but see *Tynte v. Hodge*, 1864, 2 Hem. and M. at p. 296). It is not, however, an essential condition of relief (*l.c.*). In many cases transactions entered into by persons of mature age who fully understood what they were doing have been set aside as unconscionable (see *Chesterfield v. Janssen*).



(d) *Without Advice*.—Transactions have been set aside notwithstanding that the applicant was advised by an independent solicitor, or had deliberately refused to seek such advice (*Kevans v. Joyce*, 1896, Ir. R. vol. i. p. 442), if the applicant's circumstances were such as to induce him to pay no heed to the advice he received. Thus in *Rae v. Joyce*, 1892, 29 L. R. Ir. 500, a mortgage of a reversionary interest by a married woman, who was assisted by her husband and also by her solicitor, was set aside because the money-lender took advantage of the desperate straits in which she was for money to extort extravagant terms (see also *Miller v. Cook*, 1870, L. R. 10 Eq. 641).

(e) *Surreptitious Bargain*.—In *King v. Hamlet*, 1834 2 Myl. & K. 456, Lord Brougham held that if the transaction was approved of by the father of the expectant heir (or by some other person *in loco parentis*), who was in possession of the property charged, the fact was a bar to relief. This ruling has always been disapproved (see Sugden, *Law of Property*, pp. 65 *et seq.*; *Vendors and Purchasers*, 14th ed. p. 277), for the equity is the son's equity (*ibid.*, per Lord Selborne in *Aylesford v. Morris*, L. R. 8 Ch. at p. 491). But the concealment of the transaction from all the persons who were best able to advise the applicant, and the necessity of such concealment, in order that he may attain his end, is a material circumstance to show that he was not in a position to make a fair bargain (*l.c.*)

2. *TRANSACTIONS RELIEVED AGAINST; TO WHOM RELIEF IS GIVEN*.—Besides mortgages and sales of reversions or interests in possession, mere money obligations, such as post-obit or simple bonds, or bills of exchange (*Aylesford v. Morris* and *Nevill v. Snelling*, *supra*), have been set aside. In *Webster v. Cook*, 1867, L. R. 2 Ch. 542, Lord Chelmsford refused to set aside a mortgage of the income of certain property to which the applicant was entitled, subject to annuities which, for the time, practically exhausted it, but, apart from the fact that the property charged was substantially a reversion (see per Stuart, V. C., in *Tyler v. Yates*, 1870, L. R. 11 Eq. at p. 276), there is no doubt that the jurisdiction extends to dealings with property in possession (see per Jessel, M. R., in *Beynon v. Cooke*, *supra*; *Fry v. Lane*, *supra*, and the cases there cited).

It is sufficient that the defendant has relied upon the expectations of the plaintiff, even though he has taken no security upon them, or though the plaintiff had, in fact, no interest to charge. Thus in *Nevill v. Snelling*, 1880, 15 Ch. D. 679, the money-lender relied upon the borrower's general expectations, and also upon the probable reluctance of the borrower's father, who was a peer, to allow his son to be made a bankrupt, as an engine to compel payment of the extortionate interest for which he had stipulated.

Family arrangements, made upon full disclosure of all material circumstances, are not regarded as coming within the category of such transactions (see the notes to *Stapilton v. Stapilton*, 1739, 1 Atk. 2, in 2 White and Tudor, *Leading Cases*; *Williams v. Williams*, 1866, L. R. 2 Ch. 294; and FAMILY ARRANGEMENTS).

3. *AGAINST WHOM RELIEF IS GIVEN*.—A purchaser from the money-lender or purchaser who makes his purchase with full notice of the circumstances out of which the equity arises, is in the same position as his vendor (*Nesbitt v. Bevrige*, 1863, 32 Beav. 282; *Tottenham v. Green*, 1863, 32 L. J. Ch. 201).

In accordance with this rule relief was given against the purchaser of post-obit bonds for £40,000, payable on the vendor's father's death, which were sold at an auction "without reserve," because the circumstances of the sale should have informed him that the vendor, who was the obligor,

had acted under the stress of great necessity (*Fox v. Wright*, 1821, 6 Madd. 111; 22 R. R. 251).

4. *TERMS OF RELIEF*.—When the transaction complained of is set aside, the usual course is to direct the plaintiff to repay the sum actually advanced with interest at the rate of £5 per cent. In a recent case only £4 per cent. was allowed (*Fry v. Lanc*, *supra*). In *Nesbitt v. BevrIDGE*, 1863, 4 De G., J. & S. 45, Lord Westbury said the usual course was, in the absence of misconduct, to give no costs to either party; but in many cases the plaintiff has been ordered also to pay the costs of the action (e.g. *Miller v. Cook*, 1870, L. R. 10 Eq. 641), unless fraud were proved against him, or a sufficient offer had been made before action and refused by him (*Tottenham v. Emmet*, 1864, 11 L. T. N. S. 404; 12 *ibid.* 838; *Beynon v. Cooke*; *Aylesford v. Morris*, *supra*). In *Fry v. Lanc*, however, Kay, J., said there was no definite rule as to costs.

If the transaction is a sale or mortgage, the property is allowed to remain as security for the payment of the sum ordered to be repaid, and, in the event of non-payment, the action is dismissed with costs (*Aylesford v. Morris*, and see decrees in Seton's *Judgments and Orders*, 5th ed., pp. 1947, 1949).

5. *CONFIRMATION AND LACHES*.—If the claimant has deliberately affirmed the transaction of which he complains after the special circumstances which occasioned his inability to protect himself have ceased to operate (*Gowland v. De Faria*, 1810, 17 Ves. 20; 11 R. R. 9; *Beynon v. Cooke*, 1875, L. R. 10 Ch. at p. 393 n.; *King v. Hamlet*, 1834, 2 Myl. & K. 456), and after he has learnt of his right to set the transaction aside (*Savery v. King*, 1856, 5 H. L. 627), the Court will not set it aside (see the judgments in *Chesterfield v. Janssen*, *supra*, in which case the defence of confirmation succeeded; and see also *ACQUIESCENCE*). In the case of a reversionary interest, mere delay until the interest falls into possession is of no importance (*Beynon v. Cooke*, *supra*; *Readdy v. Prendergast*, 1886, 55 L. T. N. S. 767).

**Cathedral.**—See DEAN AND CHAPTER.

**Catholic (Roman) Emancipation.** — See ROMAN CATHOLIC.

**Cattle.**—See ANIMALS; CONTAGIOUS DISEASES.

**Cattle Food.**—See MANURES AND CATTLE FOOD; FERTILISERS AND FEEDING STUFFS; FOOD.

**Cattle Gate (or Beast Gate).**—A “walk” or pasture for cattle; one cattle gate being pasture for one cow or five sheep; and three are considered equal to the pasture of two horses. The phrase is chiefly used in the northern counties of England; and beast gate and cattle stint have the same meaning in other parts. In the southern counties corresponding terms are cows-grass; pasture sufficient for a horse, a “horse leaze” in Dorset; a sheep leaze in Sussex, and so on.

Many common lands belonging to manors, boroughs, or townships are subject to rights which may be more than mere rights of common (*q.v.*). Either the whole or a portion of the waste may be used by a class of persons, such as burgesses or copyholders, for depasturing their cattle; each person being entitled to put a stinted or limited number thereon according to a custom.

The right of doing this in common with others entitled to the same right is called a cattle gate or cattle stint.

In some cases it has been decided that this right comprises an interest in the soil vested in the owners as tenants in common in fee (*R. v. Whitley*, 1786, 1 T. R. 137; *R. v. Watson*, 1804, 5 East, 480).

In other, and more usual, cases, the right has been held to be a right of exclusive pasture, or to an undivided share in the pasture carrying no interest in the soil, but of an incorporeal nature capable of being transferred by grant or customary deed (Burton, *Compendium*, p. 360). That it is more than a mere right of common is shown by the exclusion of the owner of the soil itself from pasturing his own cattle; its being capable of transfer to strangers; the power of the gate owners to license the pasturing of strangers' cattle; and that formerly it would have been vindicated by action of trespass or ejectment, and not by action on the case (*Lonsdale v. Rigg*, 1856, 11 Ex. Rep. 654, and 1 H. & N. 923).

Where tenants had "full benefit and right to the herbage," it was held that this was not real or personal property within the meaning of the Malicious Injuries to Property Act, 1861, 24 & 25 Vict. c. 97, s. 52, as it was not tangible property (*Laws v. Eltringham*, 1881, 8 Q. B. D. 283).

Probably if there is an interest in the soil, the mines and minerals and sporting rights belong to the owners of the cattle gates.

Lands subject to either class of rights may be enclosed under the various General Inclosure Acts.

See 8 & 9 Vict. c. 118, s. 11; Williams, *Rights of Common*; Elton, *Law of Commons* and *Law of Copyholds*; and Scriven on *Copyholds*. See COPYHOLDS.

**Cattle Salesmen.**—Persons whose business it is to sell cattle for others as factors, or by auction, and who are mercantile agents within the provisions of the Factors Acts, having, in the customary course of their business, authority to sell goods. See FACTOR.

By 31 Geo. II. c. 40, s. 11 (1758), in order to prevent abuses by cattle salesmen to the prejudice of their employers, cattle salesmen in London, and others who sell cattle there on commission, are forbidden to buy live cattle, sheep, or swine, on their own account, either in London, or while on the road to London (except for actual use by themselves and family), or to sell on their own account in London, or within the weekly bills of mortality (*q.v.*), any live cattle, sheep, or swine, under a penalty of double the value of the cattle bought and sold.

By sec. 4 of the Markets and Fairs (Weighing of Cattle) Act, 1891, 54 & 55 Vict. c. 70, an auctioneer, unless exempted by the Board of Agriculture (*q.v.*), shall not sell cattle at any mart where cattle are habitually or periodically sold, unless there are provided similar facilities for weighing, as when cattle are sold at a market or fair; and he must make such returns as to the entries, weighing, and sale of cattle there as are required of market authorities. In default in either respect he is liable to a penalty not exceeding £20, or, in case of a continuing offence, £10 for every day, recoverable by summary procedure.

**Cause List.**—Every evening during the sittings of the Courts a list is prepared and published, under authority, of all causes that are likely to be reached by the various Divisions of the High Court the following day.

The causes are taken in the same order as they are placed in the list.

An official weekly list at *Nisi Prius* is also published. This list gives fuller information than the daily list, as it gives the names of the solicitors and the nature of each action.

No cause can be removed from or interpolated in this list without the leave or order of a judge (see *Official Regulations, Annual Practice*, vol. ii. p. 91).

Cause Lists for the term are also published.

The Daily Cause List can be obtained for £1, 5s. per annum; the Daily Cause List, Sittings Paper, Appeal Lists, and all official publications (all Divisions) for 4 guineas.

On a similar plan Cause Lists are published by the Privy Council, the House of Lords, and the Mayor's Court.

**Cause or Matter.**—See MATTER (CAUSE OR).

**Caution.**—1. After the completion of the case for the prosecution on a preliminary inquiry under the Indictable Offences Act, 1848, 11 & 12 Vict. c. 42, s. 18, it is the duty of the presiding justice, after the depositions have been read to the accused, to say to the accused words to the following effect: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you at your trial." He must also, before any statement is made, give the prisoner clearly to understand that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been made or held out to induce him to make any confession of guilt. This is known as cautioning the prisoner.

A similar procedure must be adopted when it is proposed to deal summarily with an indictable offence (42 & 43 Vict. c. 49, s. 13).

In the case of a summary offence, as to which the accused has a right to elect to be tried on indictment, he must at the outset of the proceedings be informed of his right (42 & 43 Vict. c. 49, s. 17).

It is also necessary to inform the accused of his right to call witnesses, and where he is a competent witness, of his right to be sworn. For forms of caution, see Stone, *Justices' Manual*, 29th ed., appendix.

2. The provisions of sec. 18 of the Indictable Offences Act, 1848, above cited, do not affect the admissibility of extrajudicial statements made on arrest or before trial of the accused. See ADMISSION IN CRIMINAL CASES; CONFESSION.

3. The police are clearly not entitled to interrogate prisoners, or to extract incriminating admissions. If they were, their powers would be greater than that of judges, justices, or jurors. (See the views of Hawkins, J., in *Howard Vincent, Police Code*, 1882, pp. 7, 8; and of A. L. Smith, J., in *R. v. Gavin*, 1884, 15 Cox C.C. 656.) It is usual on making an arrest not to question the accused, and to caution him if he is disposed to make

statements, or if any inquiries seem to be necessary, *e.g.* where a man is suspected of being in unlawful possession of property.

It has been held in *R. v. Brackenbury*, 1893, 17 Cox C. C. 628, that where the police before arrest question a man without cautioning him, his answers are admissible in evidence. The contrary was held in *R. v. Gavin*, 1884, 15 Cox C. C. 656. The other decisions are collected in the notes to these two cases. Some judges decline to admit such statements, and most, if not all, disapprove of the practice of asking incriminating questions, either before or after arrest. And see *R. v. Thompson* [1893], 2 Q. B. 12.

4. Caution in Scottish law means bail or security.

**Caveat.**—A caveat is a caution registered in a public department to indicate to the officials that they are not to act in the matter mentioned in the caveat without first giving notice to the caveator. Several kinds of such caveats are recognised by our law. For instance, in connection with the grant of marriage licences (see MARRIAGE LICENCE), and dealings with land registered in the land registry (see REGISTRATION OF TITLE and LAND TRANSFER). The most important instance is the caveat of the probate registry, and that alone is considered in the remainder of this article.

“A caveat is a warning in writing lodged in the principal probate registry, or in a district probate registry, giving notice to the registrar not to issue any grant, or to take any step in reference to the personal estate of the deceased named in the writing, without notice being first given to the party, or to the solicitor of the party, who has lodged the caveat” (Tristram and Coote, *Probate Practice*, 12th ed., Part II. ch.<sup>h</sup> ii.).

Such a caveat is lodged by a person who claims an interest in the estate of the deceased, either under a will or testamentary paper (*e.g.* as executor or legatee named in it, or as next of kin, or creditor), for the purpose of enabling him to get time before any other person obtains a grant of probate (*e.g.* under another testamentary paper, or of letters of administration); or to raise any question upon the application by any other person for such grant; or to obtain information of the name and address of any claimant seeking to obtain such grant. It has the effect of securing that a “warning” shall be given to the caveator. (In the following sketch of the practice as to caveats, the letter R. means the Probate Rules, and the letters N. C. and D. R. mean the rules for non-contentious business and for the district registries respectively. For further information and forms, see Tristram and Coote, *loc. cit.*)

It may be entered by the caveator in person or by his solicitor, either in the principal or in the district registry (R. 59, N. C.). In the former case notice is to be sent to the registrar, to the district registrar of any district where the deceased resided, or had a fixed place of abode at his death (R. 74, D. R.).

If it is entered in a district registry, the registrar is to send notice to the principal registry, and also to every such district registry as aforesaid (*ibid.*).

The caveat does not affect any grant made on the day on which it is entered, or notice of it is received in the registry from which the grant issues (R. 62, N. C.; 75 D. R.). Subject to this, no grant can be made, while it stands without a “warning,” and the district registrar will not make a grant till it has been warned and proof of no appearance is given, or till he has received notice from the principal registry that the contentious proceedings consequent upon the caveat have terminated (R. 77, D. R.; Probate Act, 1857, s. 48).

An applicant whose application is stopped by a caveat takes out a "warning" calling upon the caveator within six days to cause an appearance to be entered for him in the principal registry. The warning is obtained from the principal registry, and must be served by the applicant at the address received in the caveat (R. 63, N. C.), or it may be sent by the registrar by post to such address (R. 64). It must state the name and interest of the applicant, the date of the will or codicil under which he claims (if any), and an address for service upon him within three miles of the General Post Office (R. 65).

If the caveator does not appear within the six days, or before the grant has actually passed, and an affidavit of service of the warning, search, and non-appearance is filed, the caveat is "cleared off" (R. 67).

If he does appear, except by his consent, or upon withdrawal ("subduction") of the caveat, no grant can be issued until the Court has decided the question between the caveator and the applicant. In his appearance the caveator must, unless otherwise permitted by an order of the judge or a registrar, state the nature of the interest he claims (Tristram and Coote, *loc. cit.*). The applicant's proper course upon appearance being entered, is to either commence a probate action against the caveator, or take out a summons to show cause why the contentious proceedings should not be abandoned (Tristram and Coote, Part I. ch. xvii.).

A caveat remains in force only six months, but it may be renewed (R. 60 of 1862).

A citation to any person to accept or refuse a grant is always accompanied by a caveat. See PROBATE.

**Caveat Actor.**—There is no general rule of the common law that, apart from contract, negligence, or malicious intention (as to which last see MALICE; *Mogul Steamship Co. v. McGregor* [1892], App. Cas. 25; and *Corporation of Bradford v. Pickles* [1895], App. Cas. 587), a man "acts at his peril," and is liable for injurious consequences to others which are the results of his actions. Such a rule has been asserted upon the analogy of the exceptions referred to below, and upon the authority of some scattered *dicta*, and of a few cases for damage by personal injuries, in which the defence that the damage was done accidentally and by misfortune, and against the will of the defendant, were held to be insufficient (*Weaver v. Ward*, 1616, Hob. 134; *Dickenson v. Watson*, 1682, Jones, 205; *Underwood v. Hewson*, 1723, 1 Stra. 596; and in America, *Castle v. Duryee*, 1865, 2 Keyes, 169; see the discussion of these cases in Pollock on *Torts*, 4th ed., pp. 121 to 134); but it is clearly opposed to the current of authority, and to the universal assumption in collision and running-down cases, that the foundation of the cause of action is the defendant's negligence (see *Holmes v. Mather*, 1875, L. R. 10 Ex. 261, and NEGLIGENCE). In a recent case, where the cause of action alleged was the accidental injury to a gun carrier by a pellet from the defendant's gun, and the jury found there was no negligence, Denman, J., refused to follow the old shooting cases above cited, and gave judgment for the defendant (*Stanley v. Powell* [1891], 1 Q. B. 36). See also the American Supreme Court case, *Parrot v. Wells*, 1872, 15 Wallace, 524, where a carrier was held not to be liable for the damage done by a cask of nitro-glycerine, delivered to him without notice as to its dangerous character, and exploded by the act of his servant. The subject will be found discussed and the authorities very ably criticised in Holmes on the *Common Law*, Lect. iii. The true rule of liability in tort, so far as it can be generalised, is that a man is required, in doing any-

thing which he voluntarily undertakes to do, to act up to the average standard of care and foresight applied to the circumstances of the particular case by the Court or jury (see *Holmes, loc. cit.* and p. 108; *Pollock on Torts*, ch. i.), and that, except in so far as a loss or injury occasioned by the act of one man to the property or person of another is cast upon the actor by his failure to keep up to this standard, the policy of the law is to let the loss lie as it falls. There are, of course, a number of further exceptions both ways, of which the most striking only need be referred to here. First, where the actor is exercising what is recognised as his legal right, he is not responsible for injuries, however grave, which he thereby causes to another. The right of honest trade by competition (see *Mogul Steamship Co. v. M'Gregor, supra*, and *MALICE*), and the right to intercept the prospect from a house, and the right to dig on one's own land and tap a neighbour's water supply (*Corporation of Bradford v. Pickles, supra*), are illustrations of this. On the other hand, the liability in respect of trespass to land (see *TRESPASS TO LAND*), or interruption of the easements, such as ancient lights, attached to its enjoyment, and the liability in respect of the conversion of goods, where the defendant has no notice of the interest of the plaintiff in the land, or easement, or goods, are well recognised exceptions in which the rule is *caveat actor*, and it was upon the analogy of these that the suggested general rule was most plausibly supported. Another important exception (possibly rather an apparent than a real exception to the rule) is the class of cases in which anyone who does, or causes to be done, a specially dangerous act, as pulling down a house adjoining another house (*Bower v. Peate*, 1876, 1 Q. B. D. 321; *Hughes v. Percival*, 1883, 8 App. Cas. 443), or collecting a body of water upon high ground (*Fletcher v. Ryland*, 1868, L. R. 1 Ex. 265; 3 H. L. 330), or keeping an animal which is by nature harmful to man (see *ANIMALS*), is bound to do it safely in all events. For other exceptions, or apparent exceptions, see the articles upon *COPYRIGHT*, *DEFAMATION*, *EMPLOYERS' LIABILITY*, *PATENTS*, and *TRADE MARKS*. See, further, the articles on *ACT OF GOD*, *ACCIDENT*, and *RES IPSA LOQUITUR*.

## Caveat Emptor.

### 1. SALE OF GOODS.

"In general, where an article is offered for sale, and is open to the inspection of the purchaser, the common law does not permit the latter to complain that the defects, if any, of the article, are not pointed out to him. The rules are *Caveat Emptor* and *Simplex commendatio non obligat*" (Benjamin on *Sale*, 4th ed., p. 404; see *Barn v. Gibson*, 1838, 3 Mee. & W. 390, and *Jones v. Just*, 1868, L. R. 3 Q. B. 197). A similar rule applied in regard to title, it being formerly held that there was no implied warranty of title upon the sale of goods (*Morley v. Allenborough*, 1849, 3 Ex. Rep. 500) until the exceptions "ate up the rule." Both rules were modified by modern decisions. The present law on the subject is contained in the *Sale of Goods Act*, 1893. The sections referred to in this section are those of that Act.

The rights of the buyer under the conditions and agreements implied by the rules of the Act may be negatived or varied by express agreement, or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract (s. 55). As to usages binding on the parties, see the notes to *Wigglesworth v. Dallison* in 1. Smith, *Leading Cases*, 10th ed., 528, and *CUSTOM*.

*Title.*—Sec. 12 provides that in a contract of sale (or an agreement to sell (s. 62)), unless the circumstances of the case are such as to show a different intention (e.g. a sale by a sheriff, see per Mellish, L. J., in *Ex parte Villars*, 1874, L. R. 9 Ch., at p. 439), there is: (1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell them at the time when the property is to pass (see ss. 16–18, and SALE OF GOODS); and (2) an implied warranty that the buyer shall have and enjoy quiet possession of the goods (see QUIET ENJOYMENT); and (3) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made (cp. the covenants for title in a conveyance of real property. These extend to disclosed defects, *Page v. Midland Ry.* [1894], 1 Ch. 11).

The distinction between the condition and the warranties hereby implied is that a failure in regard to the former enables the buyer to rescind the contract, unless he has waived his right to do so, but a breach of the latter gives him only a right to damages (s. 11).

*Quality and Fitness.*—Sec. 14 provides that, subject to the provisions of the Act (see *Sale by Description*, below), and of any statute in that behalf (e.g. the warranty that on the sale of goods to which a trade mark or trade description has been applied, the mark or description is genuine and not falsely applied, under s. 17 of the Merchandise Marks Act, 1887), there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale *except* in the cases following:—

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose; provided that in the case of a contract for the sale of a specified article under its patent or other trade name (see *Chanter v. Hopkins*, 1838, 4 Mee. & W. 399), there is no implied condition as to its fitness for any particular purpose.

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade (see above).

(4) An express warranty or condition does not negative a warranty or condition implied by the Act unless inconsistent therewith (see s. 55, quoted above).

*Sale by Description.*—Sec. 13 provides that where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not correspond with the description.

The rules stated above apply to implied or tacit warranties. It is, of course, open to the buyer to stipulate expressly for, or for the seller to offer,



express warranties in regard to fitness, quality, or title or any other matter affecting the sale. See WARRANTY.

If the seller induces the buyer to buy by any material misrepresentation fraudulently made in regard to them, the rule of *caveat emptor* does not apply to prevent the buyer rescinding the purchase or claiming damages for the fraud, and "the use of any device by the vendor to induce the buyer to omit inquiry or examination into the defects of the thing sold is as much a fraud as an active concealment by the vendor himself" (Benjamin, p. 405). See FRAUD.

## 2. SALES OF LAND.

*Title*.—An agreement for the sale of land, which does not otherwise provide, is an agreement to sell the whole of the vendor's interest in the land; and such interest, if not described, will be implied to be an estate in fee simple (Dart on *Vendors and Purchasers*, 6th ed., 128; Sugden, 14th ed., p. 298); and the vendor is bound, unless the agreement otherwise provides, to make out a title to the land extending back for forty years (Vendor and Purchaser Act, 1874, s. 1), except in a few special cases where a longer title is required (as to which see Wolstenholme's *Conveyancing Acts*, 7th ed., p. 2). Some further exceptions arise from the rule that, where a term of years is sold, the vendor is not bound to show the lessor's title (Vendor and Purchaser Act, 1874, s. 2; Conveyancing Act, 1881, ss. 3 (1) and 13). If the vendor is unable to show the full title required in accordance with this obligation, or with the agreement for the sale, if that varies it, the vendor cannot enforce the contract against the purchaser (Dart, *Vendors and Purchasers*, 6th ed., p. 1086) by way either of specific performance (Sugden on *Vendors and Purchasers*, 14th ed., p. 217) or of an action for damages. To the latter the purchaser could successfully plead that the vendor had not a good title in accordance with the contract (*De Medina v. Norman*, 1842, 9 Mee. & W. 820; *Ellis v. Rogers*, 1884, 29 Ch. D. 661). So by agreeing to let, a lessor impliedly promises that he has a good title to let (*Stranks v. St. John*, 1867, L. R. 2 C. P. 376).

*Other Defects*.—The vendor, upon an agreement for the sale of land, is bound to point out to the purchaser all material defects of which he is aware, and which are latent, that is to say, such that the vendor cannot by the greatest attention discover them (Sugden, p. 333; Dart, p. 102); and if he fail to do so he cannot enforce the contract (*ibid.*). And the vendor must not, either during a treaty for, or while attending, a sale, endeavour to conceal a defect, or to divert the purchaser's attention from it (*ibid.*). But he is not obliged to call attention to patent defects, as a road or footway across the land to be sold. In such cases the rule *caveat emptor* applies, and therefore the purchaser can have no relief (Sugden, p. 328; *Bowles v. Round*, 1800, 5 Ves. 508; 5 R. R. 107).

*After the Contract until Completion*.—If the vendor remain in possession, he is a trustee for the purchaser, and is bound to take reasonable care to preserve the property. If he neglects to do so, and an injury accrues in consequence, the purchaser can sue the vendor in respect of it, even after conveyance (*Clarke v. Ramuz* [1891], 2 Q. B. 456).

*After the Conveyance* is executed by all necessary parties, the purchaser has no remedy at law or in equity in respect of defects in the title to, or the quantity or quality of, the estate in the land, except upon the vendor's covenants, and except in cases of fraud or total failure of consideration (*Joliffe v. Baker*, 1883, 11 Q. B. D. 255, per W. Williams, J., citing Dart, ch. xiv. ss. 5 and 6; Sugden, p. 328, to the same effect). So Lord Coke

wrote: "By the civil law every man is bound to warrant the thing that he selleth or conveyeth, albeit there is no express warranty, but the common law bindeth him not unless there be a warranty" (Co. Lit. 102, a). As to implied warranties, see APT WORDS and COVENANT.

**Celibacy of Clergy.**—The marriage and living in wedlock of priests in the Church of England was in pre-Reformation times forbidden by English canons. The statute law enforced the prohibition under the penalties of felony, so lately as 1539 (see 31 Hen. VIII. c. 14, commonly called the "Six Articles" Act). In the following year, 1540, the Legislature (32 Hen. VIII. c. 10) moderated the penalties, and in 1548 (2 & 3 Edw. VI. c. 21), while still recognising celibacy as a counsel of perfection, avoided all laws and canons forbidding marriage "to any ecclesiastical or spiritual person or persons . . . which by God's law may lawfully marry." The operation of the last-named Act was extended in 1551 by the 5 & 6 Edw. VI. c. 12, so as to make the marriages lawful for all purposes, especially legitimization of issue, tenancy by the curtesy, and dower. Both the Acts of Edw. VI. were repealed by 1 Mary (sess. 2), c. 2, but revived by 1 Jac. I. c. 25. The 32nd article (1562) affords a *contemporanea expositio* of "God's law" on the subject, thus: "Bishops, priests, and deacons are not commanded by God's law either to vow the estate of single life or to abstain from marriage: Therefore it is lawful for them, as for other Christian men, to marry at their own discretion, as they shall judge the same to serve better to godliness" (see ARTICLES, THIRTY-NINE). This article may now be taken to represent the existing law of Church and Realm on the subject.

Bigamy in its original sense (*i.e.* the marrying of two or more wives successively or one widow) deprived a felonious clerk of the benefit of clergy till 1 Edw. VI. c. 12 (see BENEFIT OF CLERGY and BIGAMY).

[Gibs. *Codex* i. 423, 434, 438; Pollock and Maitland, *Hist. of Eng. Law*, i. 74, 428.]

**Cellars.**—Statutory limits have been imposed on the right of property owners to construct and use cellars or underground rooms. They may be classified as (1) regulations imposed to secure the safety of the passing public; (2) for the sake of the public health; and (3) for the health of those who use them.

• (1) The Towns Improvement Clauses Act, 1847, 10 & 11 Vict. c. 36, s. 73, requires proper coverings to be provided by the occupier of any vault or cellar opening in any pavement or footpath; and the Police Clauses Act of the same year (c. 89, s. 28) imposes a penalty on every person who leaves open the entrance from any street to a cellar or room underground, or leaves defective the door, window, or other covering of any vault or cellar. These Acts were originally adoptive, but now apply to all urban districts by virtue of the Public Health Act, 1875, 38 & 39 Vict. c. 55, ss. 160 and 171. By sec. 26 of that Act no vault, arch, or cellar can be newly built or constructed under the carriageway of any street without the written consent of the urban authority. Subject to compliance with the building regulations in force in the district, they can be constructed under footways. In 1890 further powers were given enabling urban authorities, where default is made by the owners or occupiers of vaults, arches, or cellars under any street, etc., in keeping them in good repair, to interfere after twenty-four hours' notice

and make good the defects at the expense of such owner or occupier (53 & 54 Vict. c. 59, s. 35). This Act only applies to districts in which it has been formally adopted by the urban authority (*ibid.* s. 3).

(2) The health of the public is protected by a clause in the Factory Act, 1895, affecting bakehouses (*g.v.*). A place underground may not be used as a bakehouse, unless it was so used prior to 1896 (58 & 59 Vict. c. 37, s. 27).

(3) The Towns Improvement Clauses Act, 1847, gives power, in districts where the Act is adopted, to prohibit the occupation as a dwelling-place of any cellar under any house in any court (10 & 11 Vict. c. 34, s. 113), and prohibits the occupation as a dwelling-place of any cellar or room under any house within the limits, although situated in a court, unless it complies with conditions prescribed for securing adequate light, ventilation, and drainage (*ibid.* s. 114). These powers, which applied only to some urban districts, were extended to the whole of England and Wales by the Public Health Act, 1875. Since its passing, no cellar, vault, or underground room, not then lawfully let or occupied as a dwelling, may be so occupied at all (38 & 39 Vict. c. 55, s. 71); and the conditions limiting the use of other cellars as dwellings have been made somewhat more stringent than those previously laid down, and are, moreover, enforceable throughout the whole county (*ibid.* s. 72). In case of two convictions within three months, the place may be ordered to be closed, temporarily or permanently (*ibid.* s. 75).

It is also made an offence in *an urban* district to suffer any waste or stagnant water to remain in any cellar or place within any dwelling-house for twenty-four hours after notice to remove it (*ibid.* s. 47).

Very similar powers as regards the Metropolis are given by the Public Health London Act, 1891, 54 & 55 Vict. c. 76, ss. 96-98. The conditions under which cellars may be occupied are, however, set out in greater detail; and a power is given to the sanitary authority and the Local Government Board to dispense with or modify any condition involving the structural alteration of the building if they are of opinion that they can properly do so, having regard to the fitness of the rooms for human habitation, etc. The prohibition against newly using cellars as dwellings has not been applied to London.

**Cement.**—Cement works must be registered under the Act 45 & 46 Vict. c. 37, see s. 11.

**Cemeteries.**—See also BURIAL; CREMATION.

The statute law as to cemeteries is complex, composed of numerous Acts each of which has usually amended and repealed parts of those previously existing. It has not yet been codified, though it might be with advantage to everyone. The statutes are in two groups: (1) the Cemeteries Clauses Act, 1847, 10 & 11 Vict. c. 65, intended to regulate the conditions under which parliamentary powers should thereafter be given to individuals or companies for the establishment of cemeteries as matters of business; the whole or part of which has been incorporated in many private Acts: and (2) The Burial Acts, 1852 to 1871, enumerated in the schedule to 34 & 35 Vict. c. 33, intended to regulate and provide for interments in populous places, where the parish churchyards or other burial places proved insufficient. The original Act of 1852, 15 & 16 Vict. c. 85, applied only to the Metropolis, but the more important sections were extended in the next

year to all parishes (16 & 17 Vict. c. 134, s. 7). Many of the clauses of the Burial Acts are similar in object and wording to those in the earlier Cemeteries Clauses Act; but they are seldom identical.

The chief objects of the Burial Acts are: (1) to provide for the closing of crowded burial grounds, (2) to establish burial boards, and (3) to confer on the Central Government large powers of controlling all places of burial.

The Privy Council may order burials to cease wholly or partially in any existing burial ground, and prohibit the opening of a new burial ground, without the approval of the Home Secretary, within any named limits (16 & 17 Vict. c. 134, s. 1). Burial grounds belonging to Quakers, Jews, or which are private property are not affected, unless expressly named in the order (*ibid.* s. 2; see also 30 & 31 Vict. c. 133, s. 9).

Burial boards may be appointed by resolution of the Vestry (now Parish or Urban Council) for any separate parish, township, or district (15 & 16 Vict. c. 85, s. 10; 18 & 19 Vict. c. 128, s. 12; 20 & 21 Vict. c. 81, s. 5); or for two or more places united for ecclesiastical purposes, none of which separately maintains its own poor, or has a separate burial ground (18 & 19 Vict. c. 128, s. 11; 20 & 21 Vict. c. 81, s. 9). They may also be appointed with the sanction of the Home Secretary for parishes united or divided for ecclesiastical purposes, although there is already a separate burial ground for one or more of such parishes or divisions (18 & 19 Vict. c. 128, s. 11; 20 & 21 Vict. c. 81, s. 9; 23 & 24 Vict. c. 64, s. 4). Parishes may agree to form a joint burial board (15 & 16 Vict. c. 85, s. 23). Town councils may obtain the powers of a burial board for their districts (17 & 18 Vict. c. 87, s. 2); so may urban district councils (18 & 19 Vict. c. 128, s. 20; 29 & 30 Vict. c. 99, s. 64).

It is the duty of a burial board when appointed to provide a cemetery for the parish or parishes for which it is appointed to act, either within or without the limits of the parish (15 & 16 Vict. c. 85, s. 25). For this purpose they may purchase land (but not compulsorily) (*ibid.* s. 29), and may acquire an existing cemetery (*ibid.* s. 26), or a burial ground provided under the Church Building Acts, 20 & 21 Vict. c. 81, s. 7; the cemetery so provided is to be divided into two parts, one part to be consecrated according to the rites of the Church of England, and one to be left unconsecrated (16 & 17 Vict. c. 134, s. 7). The board may provide a chapel upon the consecrated part (15 & 16 Vict. c. 85, s. 30), and, if they do, must also provide one for the unconsecrated part (16 & 17 Vict. c. 134, s. 7), unless excused by the Home Secretary (18 & 19 Vict. c. 128, s. 14). The board may also provide a mortuary for the reception of bodies before interment (15 & 16 Vict. c. 85, s. 42) (see MORTUARY). The expenses are chargeable on the poor-rates of the parish or parishes for which the cemetery is provided (15 & 16 Vict. c. 85, s. 19), but the board is empowered to charge fees (18 & 19 Vict. c. 128, s. 27); if there should be any surplus income, after defraying all proper outgoings, such surplus is to be repaid to the overseers in relief of the rates (15 & 16 Vict. c. 85, s. 22). No new burial ground not already (1855) used as or appropriated for a cemetery, may be used for burial within the distance of 100 yards from any dwelling-house without the written consent of the owner, lessee, or occupier of such house (18 & 19 Vict. c. 128, s. 9). These words do not prohibit the appropriation for a cemetery of ground within the prescribed distance of a house, but only the use for burial of such part as may be within it (*Lord Cowley v. Byas*, 1877, 5 Ch. D. 944). In many instances, however, houses have, after the construction of a cemetery, been built close to it. The sanitary authority might perhaps in such cases prohibit further burials near such houses by by-

law (*Slattery v. Naylor*, 1888, 13 App. Cas. 446), or the cemetery might be closed by Order in Council.

Burial in vaults was formerly not uncommon. It was prohibited by 58 Geo. III. c. 45, s. 80, in vaults under or within twenty feet of any church erected under the Church Building Acts, except in brick or stone vaults to which the only access is on the outside of the church. No vault or grave may be made within or underneath any church or chapel, built in any urban district since 1848, and burying a corpse or coffin in such a vault is made an offence (11 & 12 Vict. c. 63, s. 83). \*Burial is also prohibited in any vault under any chapel in a cemetery, or within fifteen feet of the outer wall of such chapel (10 & 11 Vict. c. 65, s. 39). The right of burying in St. Paul's and Westminster Abbey is expressly preserved (15 & 16 Vict. c. 85, s. 8), and it may also be allowed in private vaults in the Metropolis (*ibid.* s. 6), or elsewhere (16 & 17 Vict. c. 134, s. 4), if the Home Secretary is satisfied that it will not be injurious to health.

Cemeteries which have once been consecrated are for ever removed from ordinary secular uses (*Campbell v. Puddington*, 1848, 2 Rob. Eccl. 559, approved in *R. v. Twiss*, 1869, L. R. 4 Q. B. 412). A company or sanitary authority acting under the powers of the Cemeteries Clauses Act may not sell or dispose of any land which shall have been consecrated or used for burial (10 & 11 Vict. c. 65, s. 9). This protection, however, was not extended to unconsecrated cemeteries generally until the year 1884, when an Act was passed prohibiting the erection upon any disused burial ground of any buildings, except for the purpose of enlarging a church, chapel, meeting-house, or other place of worship (47 & 48 Vict. c. 72, s. 3). Disused burial ground in this Act means any ground which has at any time been set apart for the purposes of interment, whether actually so used or not (*In re Ponsford and Newport School Board* [1894], 1 Ch. 454). Disused burial grounds may be acquired by local authorities and laid out as recreation grounds (44 & 45 Vict. c. 34, s. 4; 50 & 51 Vict. c. 32).

In 1879 general powers for providing cemeteries were conferred on all sanitary authorities, rural as well as urban (42 & 43 Vict. c. 31); for this purpose the powers, not of the various Burial Acts, but of the Cemeteries Clauses Act, 1847, were incorporated in the Public Health Acts. Their powers are therefore in this capacity as cemetery authority not the same as those which some sanitary authorities previously possessed in their capacity as burial boards. This Act, coupled with the general powers conferred by the Public Health Acts, enables a sanitary authority to acquire, construct, and maintain a cemetery, within or without their district. It also empowers the Local Government Board to compel them to provide a cemetery where necessary. The sanitary authority can exercise their powers of obtaining land compulsorily, which burial boards do not as a rule possess. They may make by-laws for the management of their cemetery. No part of the cemetery may be constructed within 200 yards of a dwelling-house (10 & 11 Vict. c. 65, s. 10). Part of the cemetery may be set apart and consecrated; if it is, a chapel must be provided for that part (*ibid.* s. 25) and a salaried chaplain (*q.v.*) must be appointed to officiate (ss. 27-31). The scope of the Act is explained in a circular issued by the Local Government Board, 19th Aug. 1879.

The provisions as to fencing, draining, fees, monuments, etc., are similar to those contained in the Burial Acts.

(See further Brooke Little on the *Burial Acts*; Vesey Fitz-Gerald on the *Public Health and Local Government Acts*; Lumley, *Public Health Acts*.)

The Local Government Act, 1894, 55 & 56 Vict. c. 73, practically sub-

stituted the parish council for the burial board in rural parishes (55 & 56 Vict. c. 73, s. 7 (5) and s. 53), and, where burial boards existed in urban districts down to that time, gave the right of transferring their powers to the town or district council (*ibid.* s. 62). The parish meeting in a rural parish may resolve to adopt the Burial Acts for the whole or part of their parish (55 & 56 Vict. c. 73, s. 7), and, if it does, the parish council is the body to carry out the resolution, and no burial board will be elected (subs. 7). Where the parish has no council, a board would have to be elected, unless the County Council conferred the powers of a burial board on the parish meeting (*ibid.* s. 19, subs. 10). If a parish council or meeting, however, requires to raise money by loan, as they probably would in order to establish a new cemetery, the consent of the County Council and Local Government Board is necessary (*ibid.* s. 12). Their powers of raising money by rates are also limited, as the consent of the parish meeting is required for all beyond a very limited expenditure (s. 11). Rural parishes will usually find it better to leave the duty of providing a cemetery to the district council instead of undertaking the responsibility themselves.

**Censorship of Press.**—See LIBERTY OF PRESS.

**Censure.**—See DISCIPLINE (ECCLIASTICAL).

**Census.**—The periodical numbering of the inhabitants of Great Britain and Ireland, which has been taken every ten years since the beginning of the nineteenth century. Our census aims merely at supplying statistical information, in which respect it differs from the Roman census, which was for the purpose of taxation. The term *census regalis* is, however, used to signify the annual revenue or income of the Crown. The last English and Welsh census was taken on the night of 5th April 1891, by virtue of the 53 & 54 Vict. c. 61, special Acts for the like purpose being passed for Scotland and Ireland (53 & 54 Vict. cc. 38 and 46). The total population of England and Wales, as then ascertained, amounted to 29,002,525, that of Scotland to 4,025,647, and that of Ireland to 4,704,750; while the Isle of Man was found to contain 55,598, and the Channel Islands 92,272 inhabitants. The census referred to was taken under superintendence of the Local Government Board, the whole country being divided into districts called enumerators' divisions, over which schedules were distributed requiring particulars as to name, sex, age, profession or occupation, marriage, relation to the head of the family, and birthplace, and in the case of Wales, as to whether deaf, or dumb, or blind, or imbecile, or lunatic. When these schedules so filled up were collected, the details were verified and the results sent to the Registrar-General, who prepared a final abstract thereof which was submitted to Parliament.

**Central Criminal Court.**—1. The administration of criminal justice in and near London has a somewhat curious history. The city of London, under its charter of Henry I., was granted the county of Middlesex to farm, under which grant the sheriffs of London and Middlesex were elected until 1889 (51 & 52 Vict. c. 41, ss. 46 (2), 113). Under the same charter the city were empowered to elect their own justices to keep (see

*Jewison v. Dyson*, 1842, 6 St. Tri. N. S. 1; and 9 Seld. Soc. Publ. (Coroners' Rolls), xvii.-xxviii.) and hold pleas of the Crown. Under this power a Court of Record was constituted, and no citizen of London could be impleaded on a plea of the Crown except in this Court (Pulling, *l.c.*, 209, note (x)). What its nature was is not clearly known (see Pulling, *City of London*, 170, 208); but it is submitted that this charter gave the power under which the recorder is elected, and has jurisdiction as senior judicial officer of the corporation (see Parl. Pap., 1894, c. 7493, pp. 234-236). His election is now, however, subject to appointment by the Crown, so far as relates to his exercise of judicial functions (51 & 52 Vict. c. 41, s. 42 (14)). Under the charter of 1327 (1 Edw. III.) the mayor was constituted a justice of gaol delivery for Newgate, and was to be, and still is, named in every commission issued for that purpose, Magna Carta having forbidden sheriffs, constables, and coroners to try pleas of the Crown. Newgate was from a very early date the common gaol both for London and Middlesex, so that the charter may be read as enlarging the mayor's criminal jurisdiction. The Statutes 1 Edw. III., st. 2, c. 16, etc., as to justices of the peace, applied originally only to county justices and not to justices by charter or prescription in cities and liberties, and the Act 27 Hen. VIII. c. 24, as to the jurisdiction of justices of the peace, gaol delivery, liberties, did not affect the city of London (ss. 5, 11), except, perhaps, as joining the king's justices with the charter justices in criminal Courts in such liberties.

The city of Westminster was a liberty of Middlesex having separate justices, and bills of indictment for offences there committed were found by a grand jury for the liberty. Indictments for the rest of Middlesex were found at Clerkenwell, and if not tried by the county justices at their sessions, transmitted for trial on the delivery of Newgate gaol. The Middlesex justices sat under a commission of oyer and terminer, as well as their commission of the peace (Crown Circ. Comp., ed. 1737, p. 40; 22 Hansard, 3rd series, 667; 4 Chit. *Crim. Law*, 142, 145). The limits of the jurisdiction of justices in general or Quarter Sessions were not defined as to Middlesex until 4 & 5 Will. IV. c. 36, s. 17, nor generally till 5 & 6 Vict. c. 38 and 14 & 15 Vict. c. 55, s. 13.

The sessions at the Old Bailey were from time immemorial held under a commission of gaol delivery for Newgate, and of oyer and terminer for the city. The commission, which was renewed in each mayoralty, contained, besides the persons in the present commission (2., below), the King's Ministers and Secretaries of State, the Attorney and Solicitor-General. It served as the Court of Assize for Middlesex and the city of London. No part of Essex, Kent, or Surrey was included in these commissions, and offenders thence were dealt with at assizes for the Home Circuit or the County Quarter Sessions. Two commissioners were needed to form a quorum, but the recorder was the ordinary judge, and it was his business to sentence all prisoners at the end of the session, and his privilege and duty to present in person to the Sovereign his report on all persons sentenced to death, which caused inconvenience under George IV., when Denman, who had defended Queen Charlotte, was recorder. The necessity for a report was abolished in 1837 (7 Will. IV. and 1 Vict. c. 77, s. 1), and the Central Criminal Court was given the same power as other Courts of assize to record sentence of death (4 Geo. IV. c. 48; 7 Will. IV. and 1 Vict. c. 77, ss. 3-7).

There were eight sessions yearly, which after 1785 (25 Geo. III. c. 18) could be held concurrently with the sittings of the Court of King's Bench.

That Court seldom interfered, except by *certiorari*, with London or Middlesex cases, though a grand jury for Middlesex was summoned every term, and under 35 & 36 Vict. c. 52 could still be summoned when required. London, Westminster, and Southwark were especially exempted from 38 Geo. III. c. 52, which cut down the exclusive ancient privilege, thitherto recognised, for the trial within counties of cities of offences there committed (see s. 10).

The judicial position of the chartered justices of London was not affected by the Municipal Corporations Act, 1835, and still appears to remain absolutely unaffected, the Central Criminal Court Acts of 1834 and 1837 containing special savings. But under sec. 40 (3) of the Local Government Act, 1888, the Corporation of London can assent to the city being subjected to the justices of the new county of London.

2. The inconveniences and anomalies of the double system long in force, and the growth of the metropolis, led Lord Brougham to introduce the bill which became the Central Criminal Court Act, 1834, 4 & 5 Will. IV. c. 36 (22 Hansard, 3rd series, 666). Under sec. 1 a general (not a special) commission of gaol delivery and oyer and terminer was created, which is to contain the names of the Lord Mayor of London, the Lord Chancellor, and any ex-Chancellor (all the judges of the common law Courts now), all the judges of the Supreme Court, and also ex-judges of the Court, the dean of the arches, the aldermen of the city of London, the recorder, the common serjeant and the judges of (the Sheriff's Court of London now) the city of London Court, and such. The commission is general and continuous, and lasts till renewed. It can be reissued when necessary, but it was last issued in 1881. The local limits of the jurisdiction of the Court are the counties of London and Middlesex, as created or modified by the Local Government Act, 1888, 51 & 52 Vict. c. 41, s. 89, and including the city of London and its liberties; in Essex the county borough of West Ham, and the parishes of Barking, East Ham, Little Ilford, Low Leyton, Walthamstow, Wanstead St. Mary, Woodford, and Chingford; in Kent the hamlet of Mottingham; and in Surrey the parishes of Barnes, Kew, Merton, Mortlake, Richmond, and Wimbledon.

The district was styled the Central Criminal Court District, and became for the purpose of these commissions one county for all purposes of venue, local description, trial, judgment, and execution. The marginal venue in indictments is "Central Criminal Court to wit." It is the practice to insert in the indictment the name of the parish in which the offence is said to have been committed, and the words "within the jurisdiction of the said Court" (4 & 5 Will. IV. c. 36, s. 3), but under sec. 23 of the Criminal Procedure Act, 1851, 14 & 15 Vict. c. 55, the precaution seems to be now in most cases needless.

The district of the Court can be extended into the whole or parts of the home counties for winter or spring assizes (39 & 40 Vict. c. 57; 42 & 43 Vict. c. 1), and this is done for Surrey since the abolition of the Kingston and Croydon assizes, by Order in Council annually made and gazetted.

Under the Palmer Act, 19 & 20 Vict. c. 16, and the Jurisdiction in Homicides Act, 1865, 25 & 26 Vict. c. 65, which has never been used, and the Corrupt and Illegal Practices Act, 1883, 46 & 47 Vict. c. 51, s. 504, power is given for trying in the Central Criminal Court indictments which would ordinarily be removed by *certiorari*, and tried in the Q. B. D.

Prior to 1834 admiralty sessions used to be held (under commissions issued under 28 Hen. VIII. c. 25) to try crimes committed in the admiralty jurisdiction. Under sec. 22 of the Central Criminal Court Act, that Court



was authorised to try *all* admiralty offences, and to deliver to Newgate all persons committed thereto for admiralty offences, which include offences under the Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, ss. 684, 686, 687. This power is specially reserved by 7 & 8 Vict. c. 2, s. 4, though the words of that Act, ss. 1, 2, seem to include all that is contained in the earlier enactment. This enactment appears to have transferred to the Court all the criminal jurisdiction of the Court of Admiralty in England (Parl. Pap., 1894, C. 7493, Q. 6132), and admiralty sessions have not been held since it came into force. The admiralty judge was required to be in the commission. All the Criminal Law Consolidation Acts of 1861 contain similar provisions, which deal with the trial of accessories in any place to admiralty offences within those Acts.

The Court now sits as a Court of assize for the whole district, and also as a Court of Quarter Sessions for the city of London for the trial of indictments.

It must sit at least twelve times annually, at dates fixed by four judges of the High Court on November 9 (4 & 5 Will. IV. c. 36, s. 15; 44 & 45 Vict. c. 58, s. 18). The sessions always begin on a Monday. The grand jury is charged by the recorder, if present, or by the common serjeant, and judges of the High Court do not attend until the Wednesday, to take the more serious cases, though the recorder and other commissioners have equal jurisdiction, and there is no distinction in point of position or jurisdiction between the authority of the city judges, either when taking city cases or otherwise, and that of the High Court judges) *R. v. Justices of Central Criminal Court*, 1883, 11 Q. B. D. 479).

The Lord Mayor, as first commissioner, continues to be president of the Court, and attends to open it. A sword, representing his authority, is fixed in the old Court. His jurisdiction, and that of the aldermen, except as to removal of indictments, is in theory the same as that of the judicial commissioners; but now he and the alderman in practice sit only as assessors to form a quorum, though in cases involving commercial questions their experience is found of value (Parl. Pap., 1894, C. 7493, Q. 7501).

The commissioners may sit concurrently in more than one Court or Division. Occasionally they sit in four Courts at once. A quorum of two is necessary under the statute, which is usually supplied by an alderman, though the same alderman need not assist throughout a case (*Leverson v. R.*, 1869, L. R. 4 Q. B. 394). It is sufficient that there should be two commissioners at the sessions house. It is not essential that there should be two in the same court-room.

The legislation which altered the Sheriff's Court into the city of London Court has not disqualified the judge of the latter Court from sitting, though he could be included as a commissioner, by which style the present judge (Kerr) is usually known (*Leverson v. R.*, *ubi supra*).

The grand and petty jurors are selected indiscriminately from the counties of London and Middlesex, which for this purpose are now treated as one county (51 & 52 Vict. c. 41, s. 89), and those of Kent, Essex, and Surrey, but in the case of these counties only from the areas within the Court district, as the assizes and Quarter Sessions have concurrent jurisdiction in these areas (4 & 5 Will. IV. c. 36, s. 21). The jurors summoned to the Central Criminal Court are exempted for twelve months from service at any Court except Quarter Sessions in their own counties (s. 4). Jurors gathered from different parts of the district may sit together and try cases from parts for which they do not come, and indictment forms were found and tried at the same Court.

The Local Government Act, 1888, s. 89, applied the County Juries Act of 1825 (6 Geo. IV. c. 50) to the new county of London, and abolished the exemption then existing of inhabitants of Westminster from service on juries at Middlesex sessions, and made them liable to serve on London county juries, but left the qualification of city of London jurors unaffected.

The sheriffs of the city of London always attend the Court, but those of the counties of London, Middlesex, Kent, Essex, and Surrey have also to obey precepts and summon juries (s. 4). The sheriffs' obligations with respect to the execution of capital sentences are now regulated (s. 2 (5)) by the Central Criminal Court Prisons Act, 1881, 44 & 45 Vict. c. 64.

The provisions of the Act of 1834 (s. 11) as to committal for trial by coroners or justices have been considerably modified by subsequent legislation. In 1834 committals were made under 7 Geo. IV. c. 64, ss. 1-4, which were superseded as to justices by the Indictable Offences Act, 1848, 11 & 12 Vict. c. 42, and as to coroners by the Coroners Act, 1887, 50 & 51 Vict. c. 71; and provisions were made as to the gaol to which untried prisoners were to be committed, which are superseded by the Central Criminal Court Prisons Act, 1881, 44 & 45 Vict. c. 64, s. 2, under which a Secretary of State can appoint by rule made under sec. 24 of the Prison Act, 1877, prisons for the Central Criminal Court other than Newgate, which is now used only for detention of untried prisoners during sessions or of prisoners under sentence of death. Coroners and justices now commit to Newgate or the appointed prison (44 & 45 Vict. c. 64, s. 2 (3)). There is an unrepealed direction to coroners and justices in the Act of 1834, s. 11, to specify that the commitment is under the provisions of the Central Criminal Court Act; but this seems now needless, having regard to sec. 25 of the Indictable Offences Act, 1848, and sec. 5 of the Coroners Act, 1887. As to the prisons rules in force, see Statutory Rules and Orders, Revised, vol. v., *tit.* Prison, England. The provisions of the Act of 1834 (ss. 5, 9, 14) as to the removal, custody, and maintenance of prisoners, though unrepealed, appear to be superseded by the modern legislation as to prisons and the Act of 1881.

The relation of the Court to Quarter Sessions within the district is as follows:—The right to hold general and Quarter Sessions for the city of London, Southwark, Westminster, and the Tower Hamlets was saved (by ss. 21, 23); but Quarter Sessions for the trial of indictments are not now held in the City, although there is jurisdiction to hold them (*R. v. Justices of London*, 1812, 15 East, 631), and all Quarter Sessions cases (Pulling, *London*, 217) are sent to the Central Criminal Court, which is more convenient for this purpose. Southwark Sessions are not now held, and the cases go to the South London County Sessions or the Central Criminal Court. The city justices do not seem now to act at all for Southwark (Parl. Pap., 1894, C. 7493, Q. 2741); and though the Quarter Sessions juries are still summoned, there is practically no business done (Parl. Pap., 1894, C. 7493, Q. 7980). Separate sessions for Westminster were suppressed by 7 & 8 Vict. c. 71. The jurisdiction of the Quarter Sessions for the counties of London, Middlesex, Kent, and Surrey is unaffected, except that the commission of oyer and terminer for Middlesex is not now issued, and Quarter Sessions for these counties may be held concurrently with those of the Central Criminal Court (1834, s. 21; Local Government Act, 1888, s. 89). They may transmit to that Court cases arising within its district brought before them (s. 19); and under secs. 16, 18, the Central Criminal Court may by *certiorari* remove indictments from any of these Quarter Sessions (*R. v.*

*Brier*, 1849, 14 Q. B. 569); but the power, which can only be exercised by the recorder or by a commissioner who is a judge of the Supreme Court, is rarely used. Under sec. 17 of the Act particular restrictions were placed on the jurisdiction of all the above Courts of Quarter Sessions; but these were repealed by 14 & 15 Vict. c. 55, s. 13, which put those which survive into the same position as sessions within 5 & 6 Vict. c. 38, s. 13; and a provision requiring recognisances before preferring certain classes of indictments was abolished by 9 & 10 Vict. c. 24, s. 2.

The Court has the same power as to costs as other Courts for the trial of indictable offences, except that the order must be made by two justices; and provision is made for attendance by the treasurers of all counties and county boroughs within the district of their payment (s. 12). The parishes of the city of London can now be assessed to the county rate for the county of London, for the purposes of assizes and sessions, which include these costs (51 & 52 Vict. c. 41, s. 41 (3)). The costs of offences in the admiralty jurisdiction are regulated by sec. 701 of the Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60.

Provisions are made by sec. 20 as to tables of fees, salaries or other mode of paying the officers of the Court, and as to apportioning the costs of calendars among the counties included in the Court district.

The position of the Court is somewhat anomalous since the Judicature Acts. The apparent effect of these Acts has been to make Circuit Courts (*q.v.*) of assize, oyer and terminer, and gaol delivery parts of the High Court, and it was so held in *R. v. Dudley*, 1885, 14 Q. B. D. 275, 560. But a Divisional Court has recently declined to hold that this doctrine could be extended to the Central Criminal Court. It is, however, held a superior Court, to which mandamus and apparently prohibition will not lie (*R. v. Central Criminal Court Justices*, 1883, 11 Q. B. D. 479), but *certiorari* is often granted to remove indictments found or to be found, the procedure being specifically dealt with by the Crown Office Rules, 1886, r. 41. It is not granted after the trial is commenced, except as an incident of a writ of error (*R. v. Boaler*, 1890, 7 T. L. R. 3); but it has been assumed, apparently without serious argument, that a restitution order under sec. 100 of the Larceny Act, 1861, can be questioned in the High Court by this procedure (*R. v. Central Criminal Court Justices*, 1886, 17 Q. B. D. 598; 18 Q. B. D. 314).

### Central Office.—See SUPREME COURT.

**Ceremonial** (International Law)—formalities of courtesy observed in dealings between States and their official representatives. Though hardly entitled to the dignity of being called international law, ceremonial has always played a very important part in the relations of States with each other, and care is always taken to leave as little opening as possible for discussion in such matters.

It would be impossible in the space of a short article to deal with all the ceremonial used in diplomacy. Suffice it to say that every Court has its own rules for audiences and public solemnities, visits, costumes, military honours, etc.; and that though they resemble each other very closely, each State is sole arbiter in the determination of its ceremonial, and so long as no distinctions in external politeness are made as between diplomatic representatives of the same rank of different countries, these are bound to

observe the practice in all such matters of the State to which they are accredited.

At the Congress of Vienna (1815) certain articles of precedencé were laid down for the diplomatic body (see **DIPLOMATIC AGENTS** and **AMBASSADOR**).

The ceremonial of the sea at one time involved considerations of much greater importance than of courtesy. Certain States claimed salutes from the public ships of foreign States navigating seas adjacent to their territory, as a recognition of their right of empire over such seas. At the present day maritime ceremonial is no longer connected with the idea of supremacy at sea, independent States all being now treated by each other, as regards salutes, visits, etc., on a footing of equality. This does not prevent a State from prescribing certain ceremonies to be observed by foreign ships within its own waters, provided such rules contain nothing degrading to other States.

There is an international etiquette of the high sea which requires any war vessel meeting another showing the flag of a commander of a higher rank, a merchant vessel meeting a foreign ship of war, or a ship of war entering a harbour or passing a fort (unless a sovereign or ambassador be on board), or a single warship meeting a squadron—to be the first to give the salute (see Charles de Martens, *Guide Diplomatique*; Moser, *Kleine Schriften*).

Under the Queen's Regulations and Admiralty Instructions of 1893 (ch. ii.) the salutes to diplomatic and consular authorities are as follows:—To ambassadors extraordinary and plenipotentiary, nineteen guns; to envoys extraordinary and ministers plenipotentiary and others accredited to sovereigns (with the exception of such ministers as are accredited in the specific character of "Minister Resident"), fifteen guns; ministers resident and diplomatic authorities below the rank of envoy extraordinary and minister plenipotentiary, and above that of chargé d'affaires, thirteen guns; chargés d'affaires, or a subordinate diplomatic agent left in charge of a mission, agents and consuls-general, and commissioners and consuls-general, eleven guns; consuls-general, nine guns; consuls, seven guns.

**Certificate for Costs.**—See **COSTS**.

**Certificate of Analysts.**—See **ANALYSIS**.

**Certificate of Conviction or Acquittal.**—1. At common law a conviction or acquittal by a Court of Record could, as a rule, be proved only by production of the record from the proper custody or of a copy certified by the proper officer (Archbold, Cr. Pl., 21st ed., 280-282). But it is no longer necessary to draw up a formal record for this purpose for the purpose of any civil or criminal proceeding; and under sec. 13 of the Evidence Act, 1851, 14 & 15 Vict. c. 99, a copy of the record, indictment, local conviction, or judgment or acquittal, omitting the formal parts and purporting to be certified as a true copy by the clerk of the Court or other officer having the custody of the records of the Court where the conviction or acquittal took place, is now sufficient. Giving a false certificate is an indictable misdemeanour, punishable by imprisonment for not over eighteen months (s. 15); and forgery of such a certificate is felony (s. 17). This

provision is available, both in civil and criminal proceedings (*Richardson v. Willis*, 1872, L. R. 8 Ex. 69).

Where an indictable offence is more severely punishable on proof of a previous conviction, provision for proof of the conviction is made by 7 & 8 Geo. IV. c. 28, s. 11, which is in almost the same terms, including the penalty for a false certificate, as the enactment already referred to. And a like provision is made in cases of offences within the Larceny Act, 1861, 24 & 25 Vict. c. 96, by sec. 116 of that Act; as to coinage offences, by sec. 37 of the Coinage Offences Act, 1861, 24 & 25 Vict. c. 99; and as to summary conviction for malicious damage, by 24 & 25 Vict. c. 97, s. 70.

These enactments, except sec. 116 of the Larceny Act, appear not to apply to convictions or acquittals before Courts of summary jurisdiction. But under sec. 18 of the Prevention of Crimes Act, 1871, 34 & 35 Vict. c. 112, previous convictions in any Court of the United Kingdom are provable by production of a record or extract of the conviction, and proof of the identity of the person named therein with the offender under trial. The record or extract consists in a certificate of the substance and effect of the indictment and conviction purporting to be signed by the officers already specified, or in the case of a summary conviction purporting to be signed by any justice of the peace who has (local) jurisdiction over the offence for which the conviction was made, or by the proper officer of the Court where it was made or to which it was returned. This last provision applies to cases where convictions have been transmitted or returned by justices to the clerk of the peace for preservation with the records of Quarter Sessions, a course which is prescribed in the case of dismissals for charges of an indictable offence and tried summarily (42 & 43 Vict. c. 49, s. 27 (6)), and in the case of summary convictions for malicious damage (24 & 25 Vict. c. 97, s. 70).

The provisions of the Act of 1871 appear to apply to all previous convictions, and to their proof in any legal proceeding whatever. They are alternative to other modes of proving such convictions (Act of 1871, s. 18).

2. Courts of summary jurisdiction on dismissing an information or complaint may, if asked, give a certificate of dismissal, which on production without further proof is a bar to subsequent proceedings for the same offence (11 & 12 Vict. c. 43, s. 14). Under sec. 27 (4) of the Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49, a like provision is made in the case of dismissal of a charge for an indictable offence which is tried summarily. And where the charge is one of assault under secs. 42, 43 of the Offences against the Person Act, 1861, 24 & 25 Vict. c. 100, a petty sessional Court on acquittal, after a hearing on the merits, must, if required, give a certificate of dismissal, which is a bar to all civil or criminal proceedings for the same cause (ss. 44, 45). Compare sec. 109 of the Larceny Act, 1861; and see *AUTREFOIS ACQUIT*; *AUTREFOIS CONVICT*.

3. Under sec. 25 of the Common Law Procedure Act, 1852, 17 & 18 Vict. c. 125, in civil proceedings in the superior Courts of common law, proof of the previous conviction of a witness who denies or will not answer as to the fact may be given by a certificate in similar form to those already mentioned. And under sec. 6 of Denman's Act, 28 & 29 Vict. c. 18, a like provision is made as to trials for felony or misdemeanour. These enactments do not in terms apply to proceedings in the Courts of equity or of admiralty or ecclesiastical jurisdiction (now merged in the High Court), nor to Courts of summary jurisdiction. See *CHARACTER, EVIDENCE AS TO*.

The above is believed to be a complete statement of the statute law as to proof by certificate of previous convictions, acquittals, or dismissals, and

it will demonstrate the need of a short enactment which will reduce the matter to simplicity and generality.

**Certificate of Shares.**—See COMPANY.

**Certificate of Validity.**—See PATENTS.

**Certified Copies.**—See DOCUMENTS.

**Certiorari.**—A writ issued where the Crown would be certified of the record in some inferior Court; so called from one of the opening words of the ancient form, "*quia quibuslibet certis de causis certiorari velimus super recordo*," etc. (Fitzherbert, *Natura Brevium*, ed. 1567). In criminal cases the writ is issued out of the Crown Office, and tested by the Lord Chief Justice, the Queen's Bench Division having superintending authority over all Courts of inferior criminal jurisdiction in the kingdom. It is directed in the Queen's name to the judges or officers of the inferior Court, ordering them to return the indictment, inquisition, judgment, conviction, or order, as the case may be, to the Queen's Bench Division. Similarly, in civil cases the High Court or any judge thereof has power, by the County Courts Act, 1888, 51 & 52 Vict. c. 43, s. 126, to order "the removal into the High Court by writ of *certiorari* or otherwise," of any action or matter commenced in the County Court, "if the High Court or a judge thereof shall deem it desirable." Causes are similarly removed from the Lord Mayor's Court (*Davies v. MacHenry*, 1867, L. R. 3 Ch. 200), equity cases going to the Chancery Division and common law cases to the Queen's Bench Division.

A writ of *certiorari* may at any time be claimed by the Crown as a matter of absolute right, and it issues as of course when applied for by the Attorney-General representing the Crown. This is the case even where the right to a *certiorari* is expressly taken away by statute, for unless named the Crown is not bound. In other cases it must be applied for on good cause shown. In cases of summary conviction, where no writ of error lies, the writ of *certiorari* has always acted as a valuable constitutional safeguard, and the Courts have shown themselves jealous of attempts to take away that right by statute. Under a number of special Acts, from the Profane Oaths Act, 1745, to the Public Health Act, 1875, the Municipal Corporations Act, 1882, and the Agricultural Holdings Act, 1883, it is expressly provided that convictions, orders, and so forth, under the statute "shall not be removed into the High Court by *certiorari* or otherwise"; but even in these cases the Court will not allow the Act to limit its power where there has been any excess of jurisdiction or lack of jurisdiction, or where an unauthorised penalty has been inflicted (*Ex parte Bradlaugh*, 1878, 3 Q. B. D. 509; *R. v. Skidde*, *Ex parte Saunders*, 1895, 64 L. J. M. C. 273; 72 L. T. R. 568).

Further, if an indictment charging an offence in which the *certiorari* is taken away by statute contains also counts charging an offence where there is no such prohibition, the writ may still issue. A *certiorari* is also used in order the better to consider and determine the validity of indictments and proceedings thereon, and to prevent a partial or insufficient trial, and to ensure that the parties may have the benefit of a trial in the Queen's

Bench Division. The procedure in these cases is regulated by the Crown Office Rules of 1886, rr. 28-42. Except as mentioned above, when the Attorney-General applies on behalf of the Crown, every application for a writ of *certiorari* to remove an indictment found at assizes into the Queen's Bench Division, must be made to the Divisional Court (*q.v.*) by motion for an order *nisi* to show cause. The chief grounds for such removal are that a fair and impartial trial cannot be had in the Court below, and that some question of law of more than usual difficulty and importance is likely to arise. When the Divisional Court is not sitting, application may be made to a judge at chambers.

In cases of urgency the Court or judge may order the writ to issue forthwith on *ex parte* application. Where it is wished to remove any judgment, order, or conviction had or made by the justices of the peace, it must be applied for within six calendar months. In such case a *certiorari* does not go to try the merits of the question, but to see whether the inferior Court had in fact jurisdiction. The function of the High Court is not to review the decision of the justices, but to decide if the justices were warranted in entering into the matter at all.

In civil matters, as has been said, the Court has a wider jurisdiction. The High Court or judge may order the removal of any case from the County Court if he shall "deem it desirable." That difficult questions of law are likely to arise is good ground for such an order. The application is made to a judge at chambers, and not to the Court. The grant of an order or summons to show cause operates as a stay of proceedings, and the effect of the service of the writ of *certiorari* is instantly to suspend the power of the Court in the case which it removes. If the application is for the transfer of an equity action or matter, the application is made to a judge of the Chancery Division. When there is judgment in the County Court for a sum exceeding £20, and there are no goods and chattels on which to distrain, a judge of the High Court may order a writ of *certiorari* to issue to remove the judgment into the High Court, where it will have the force and effect of a judgment of the High Court.

In the case of colonial Courts, the Privy Council will sustain as indisputable the inherent powers of the Supreme Court to issue a writ of *certiorari* to any inferior Court in the colony, a power co-extensive with the like power of the Court of Queen's Bench in England (*Colonial Bank of Australia v. Willan*, 1874, L. R. 5 P. C. 417).

No appeal lies from the decision of the Queen's Bench Division, discharging or making absolute a rule for a *certiorari* to bring up a summary conviction to have it quashed, but where the matter is not criminal, an appeal to the Court of Appeal is provided by sec. 19 of the Judicature Act, 1873; and by virtue of sec. 3 of the Appellate Jurisdiction Act, 1876, there is a further appeal to the House of Lords. [See further, Paley on *Summary Convictions*, 7th ed., ch. v. s. 2; Archbold, *Pleading and Evidence in Criminal Cases*; C. O. R., 1886, 28-42; *Annual County Court Practice*.]

**Cesser, proviso for.**—A proviso for cesser is a clause inserted into a deed for the purpose of determining a term of years created by the same deed for securing the fulfilment of certain defined purposes, as distinguished from a term created by way of demise to an ordinary lessee, so soon as the defined purposes have been fulfilled. Such terms were formerly created for serving the purposes of mortgage securities; and they are still

in frequent use under the modern practice in strict settlements of real estate, for the purpose of securing annuities intended to be limited by way of jointure, and sums of money intended to be appointed by way of portions for younger children. Before the coming into operation of the Satisfied Terms Act, 1845, 8 & 9 Vict. c. 112, such terms, in the absence of a proviso for cesser, continued to subsist after the expiration of the annuity or the satisfaction of the charge for portions (see SATISFIED TERMS). The previous partial introduction into practice of a proviso for the cesser of such terms, probably points to a recognition on the part of conveyancers of the fact that the inconvenience resulting from the keeping of such terms on foot exceeded such advantage as was to be obtained by assigning them "to attend the inheritance" (see ATTENDANT TERMS), as a protection to purchasers against mesne incumbrances.

**Cession of Territory.**—The right of the inhabitants of the ceded territory to be consulted before the completion of the cession, has been the subject of humanitarian discussion, but international law places no restrictions upon the transfer by a State of any part of its dominions to another State. It should not, of course, affect private rights of property of the inhabitants, and it is usual to give them time, with or without conditions, to choose between the old and the new nationality.

No rules exist as to how the cession should be brought to the knowledge of third parties, but it seems clear that until the State to which the territory has been made over is in actual possession, the ceding State is liable for its proper government. Lord Stowell looked for a guiding principle to the private law of possession. It was a principle of jurisprudence, he said, that the actual possession of a thing must be united to the right of taking possession before the right of property is complete, and as the practice of nations had been in conformity with this principle, the ceded country and its inhabitants continued to be under the dominion of the ceding country until possession should have been actually taken by the country to whom the territory had been ceded (*The Prama*, 1804, 5 Rob. C. p. 113).

The effect of the cession as regards treaties with other States concerning the ceded territory has not yet been authoritatively elucidated.

The following are recent cases of cession in which Great Britain has been one of the parties:—

Cession of Heligoland to Germany,	Treaty dated July 1, 1890.
" Zanzibar to Great Britain,	" " July 1, 1890.
Mahin Beach to	Oct. 24, 1885.
Scarcies River to	Agreement June 10, 1876.
Perak to	Engagement Jan. 20, 1874.
Lookoot to	Deed Aug. 23, 1860.

See ANNEXATION; CONQUEST; OCCUPATION; TREATIES.

**Cestui-que Trust.**—See BENEFICIARY; TRUSTS.

**Cestui-que Use.**—See USES.

**Cestui-que Vie.**—See ESTATES FOR LIFE.



**Ceylon.**—An island in the Indian Ocean, partially settled by the Portuguese, and after them by the Dutch. In 1795 the Dutch settlements were annexed to the Presidency of Madras; in 1801 they became a British colony; since 1815 the whole island has been under British rule. The Legislature now consists of the Governor and a nominated Council. The Supreme Court consists of the Chief Justice and two puisne judges. Appeals to the Queen in Council are regulated by the local Code of Civil Procedure. See PRIVY COUNCIL. The Roman-Dutch law is the basis of the law of the colony; but the criminal law has been codified on the model of the Indian Penal Code.—[See H. Byerley Thomson, *Institutes of the Laws of Ceylon*, published in 1866.]

**Chairman.**—See ADJOURNMENT; COMPANY; PUBLIC MEETINGS, COUNTY COUNCIL; DISTRICT COUNCIL; QUARTER SESSIONS; PARISH COUNCIL; GUARDIANS.

**Challenge.**—See JURY.

**Chamberlain, Lord.**—This officer of the household shares with the Lord Steward (*q.v.*), the Master of the Horse (*q.v.*), and the Mistress of the Robes (*q.v.*), the oversight of all officers of the household; and he has the appointment of the royal professional men and tradesmen.

Theatres in the cities of London and Westminster (except the patent theatres), the boroughs of Finsbury and Marylebone, the Tower Hamlets, Lambeth and Southwark, and in the towns of Windsor and Brighton, and other places out of London where the sovereign occasionally resides, but only during the time of residence, are licensed by him.

He has no power to make rules for enforcing order or decency, but he may suspend the licence granted by him, or close a patent theatre for any time he shall think fit, and may also order any such theatre to be closed on any public occasion.

All new plays, or additions to old ones, wherever acted for hire, must be presented to him for allowance; he is entitled to charge for their examination; and to forbid the performance of any play, if he think fit, in the interests of order and public peace. (See the Theatres Act, 1843, 6 & 7 Vict. c. 68.)

The office is a political one in the sense that its holder changes along with certain other places in the household, on a change of Government.

**Chamberlain, Lord Great.**—An officer in the sovereign's household, whose chief duties now consist in attending upon and attiring the sovereign at his coronation; in the care of the ancient palace of Westminster, the charge of and furnishing of Westminster Hall and the Houses of Parliament on State occasions; and attendance upon peers and bishops at their creation or doing of homage.

The office is hereditary in the families of Willoughby D'Eresby and Cholmondeley; the former claiming by descent from the Earls of Oxford, the original holders; and the latter through a marriage with one of the co-heiresses upon whom it descended in 1779.

**Chamberlain of the City of London.**—This officer is, and has been from time immemorial, the treasurer or banker of the city of London (see LONDON, CITY), and as such has the care and custody of the moneys called the city's cash, and of the several funds committed to the management of the corporation, and of the Chamberlain. The department of which he is the chief officer is the Chamber of London. In early times the appointment was vested in the Crown, but since 1688 the Chamberlain has been chosen from among persons of rank and standing in the corporation. Formerly he received the profits of the office as banker; but now they are limited to the amount fixed by the corporation for his remuneration; and he is bound by the rules and regulations set forth in a deed of covenant which he executes on his appointment. One of these is that his accounts are to be kept at the Bank of England, so that he no longer acts himself as banker.

He is also treasurer to the Commissioners of Sewers of the city of London; and the rates in respect thereof are paid to him.

Another of his ancient duties is that of keeping the Roll of Fræemen; and he presents those who are made citizens by honorary presentation.

The Chamberlain's Court, of which the Chamberlain and Vice-Chamberlain are the judges, has concurrent jurisdiction with the Police Court over city apprentices for determining disputes between them and their masters. It is open all the year, except in August; and counsel and solicitors may appear for parties. An appeal lies to the Mayor's Court.

(See *Statement to the Royal Commission*, 1893, *on the City of London*, pp. 99-109.)

**Chambers, Chancery Division.**—The jurisdiction in chambers of the Chancery judges dates from the year 1852. In that year, with the view of relieving the suitors of the Court from the costly delays of the Masters' office, which had long been a public scandal, the Act which was formerly known as the Master in Chancery Abolition Act, 1852, but which, by virtue of the Short Titles Act, 1896, is now styled the Court of Chancery Act, 1852, 15 & 16 Vict. c. 80, was passed. The object of the Act was to ensure that the business theretofore disposed of in the office of the Masters should be transacted under the more immediate control and direction of the judges. Accordingly, the office of Master in Ordinary of the High Court of Chancery was abolished, and the Master of the Rolls and the Vice-Chancellors, the then Chancery judges, were invested with power to sit in chambers for the despatch of such part of their business as could conveniently be dealt with there (s. 11). The chamber business was directed to be carried on in conjunction with their Court business (s. 12); and, when sitting in chambers, the judges were to have the same power and jurisdiction, in respect of the business to be brought before them, as if they were sitting in open Court (s. 13).

The Court of Chancery Act, 1852, has, with the exception of a few sections, been repealed by various Statute Law Revision Acts, but the material provisions of it relating to the business in chambers will be found to have been reproduced in the Rules of the Supreme Court, 1883.

By the Supreme Court of Judicature Act, 1873, s. 39, it was provided that any judge of the High Court of Justice may, subject to any rules of Court, exercise in chambers all or any part of the jurisdiction vested in the High Court, in all such causes and matters, and in all such proceedings in any causes or matters as before the passing of the Act might have been

heard in chambers by a single judge of any of the Courts whose jurisdiction was thereby transferred to the High Court, or as might be directed or authorised to be so heard by any rules of Court to be thereafter made.

By the Court of Chancery Act, 1852, each of the Chancery judges was empowered to appoint, with the approbation of the Lord Chancellor, two chief clerks for the purpose of assisting in the general business of each Court (s. 16). By a subsequent statute (30 & 31 Vict. c. 87) an additional chief clerk was appointed to each judge. There were also by various statutes attached to each set of chambers, junior, assistant, and additional clerks.

By sec. 77 of the Judicature Act, 1873, the chief and other clerks were transferred to the Supreme Court, holding their offices on the same terms and conditions as before the passing of the Act.

By sec. 84, the appointment of the officers in chambers is now vested in the Lord Chancellor as President of the Chancery Division.

The junior, assistant, and additional clerks are now classified as first, second, and third class clerks respectively.

The title of chief clerk has recently (1897), by order of the Lord Chancellor, with the concurrence of the Lord Chief Justice, and with the consent of the Treasury, been altered to that of "Master of the Supreme Court." [See further, MASTERS OF THE SUPREME COURT.]

The business at chambers of the judges of the Court of Chancery was regulated by certain provisions of the Court of Chancery Act, 1852, and of the Chancery Amendment Act, 1852, 15 & 16 Vict. c. 86; by Order 35 of the Consolidated General Orders issued in 1860, and by various General Orders issued from time to time dealing with this class of business. Under the Judicature Acts the general practice in chambers is governed by the provisions of the Rules of the Supreme Court, 1883, and in particular by Order 55. Speaking generally, it may be said that the new practice, at any rate so far as relates to business proper to the Chancery Division as distinguished from such as is common to that and the Queen's Bench Division of the High Court, does not, except in the largely increased use of the jurisdiction by originating summons (*q.v.*), differ materially from that which was in force before the Judicature Acts. The bulk of the rules of Order 55 are reproductions more or less modified of regulations previously existing.

In addition to the general work transacted in chambers which, as stated above, is regulated by the Rules of the Supreme Court, a large amount of the chamber business arises under what is known as the statutory jurisdiction of the Court, that is to say, proceedings which depend upon special statutes. Causes or matters in respect of which exclusive jurisdiction was given to the Court of Chancery, or any judges or judge thereof, by any Act of Parliament, are, by sec. 34 of the Judicature Act, 1873, specially assigned to the Chancery Division. By some of such statutes it is expressly provided that applications thereunder shall be made at chambers (see, *e.g.*, the Vendor and Purchaser Act, 1874; 37 & 38 Vict. c. 78, s. 9; the Settled Land Act, 1882, 45 & 46 Vict. c. 38, s. 46); in other cases rules made under the statutes have provided for various proceedings to be taken at chambers (see, *e.g.*, the Orders of March 1868, under the Companies Act, 1867, 30 & 31 Vict. c. 131; the Orders of 1878 under the Settled Estates Act, 1877, 40 & 41 Vict. c. 18). As to the statutory jurisdiction of the Court generally, see Daniell, *Chancery Practice*, 6th ed., pp. 2037-2344. In this connection it may be stated that prior to 1891 all the chamber business connected with the winding-up of public companies was dealt with in the

Chancery Chambers. Now, however, pursuant to the Companies (Winding-up) Act, 1890, 53 & 54 Vict. c. 63, this class of business has been transferred to the judge having jurisdiction in bankruptcy, and is regulated by the rules and orders issued under the last-named Act.

Any attempt at an enumeration of the various applications which can be made at chambers would be beyond the scope of this work. For information on this point, and as to the practice in chambers generally, the reader is referred to Daniell's *Chancery Practice* and other similar authorities. Some idea of the volume of work which passes through the chambers may be gathered from the following figures, which are taken from the Judicial Statistics for the year ending 31st December 1895:—

Number issued of summonses to originate proceedings . . . . .	3,078
Number of summonses issued not being summonses to originate proceedings . . . . .	15,764
Number of orders—	
Of the class drawn up by the registrars . . . . .	9,104
Of the class drawn up in chambers . . . . .	6,567
Amount of receipts on accounts other than receivers' accounts . . . . .	£4,983,916
Amount of payments therein . . . . .	4,327,608
Amount of receipts on receivers' accounts passed . . . . .	4,586,971
Amount of payments therein . . . . .	3,955,799
Amount realised by sales of estates . . . . .	1,100,594
Amount of fees collected in chambers by stamps . . . . .	14,329

A few words as to the mode of procedure may not be out of place.

The Court of Chancery Act, 1852, provided that the mode of proceeding before the Chancery judges in chambers should be by summons (s. 38); and Order 54, r. 1 of R. S. C. 1883, provides that every application at chambers not made *ex parte* shall be made by summons. A summons may be either (a) *ordinary*, where issued in pending proceedings, or (b) *originating*, where it constitutes the initial step in the proceedings (see ACTIONS IN THE HIGH COURT; SUMMONS). Originating summonses in the Chancery Division constitute a very important part of the jurisdiction exercised in chambers. The jurisdiction is not indeed new, for the originating summons was a creature of the Chancery Amendment Act, 1852. But the provisions of R. S. C. 1883, Order 55, r. 3, under which questions arising in the administration of the estates of deceased persons, or under any deed or instrument creating a trust can be decided without the tedious and often unnecessary accounts and inquiries (*q.v.*) which were almost invariably directed by an administration decree or order under the old practice, have done much to develop and extend the use of this mode of obtaining a judicial decision. In December 1885, r. 5A was added to Order 55, under which rule a mortgagee or mortgagor can, by originating summons, obtain an order for foreclosure, redemption, or other similar relief. That the suitors of the Court have not been slow to avail themselves of the increased facilities for speedy despatch of business afforded by these provisions is sufficiently shown by the fact that since 1883 the number of originating summonses issued annually has more than trebled.

Even more remarkable is the eloquent testimony afforded by the following statistics to the effect of the present practice in diminishing the number of accounts annually passed through the Court, with a saving at once of time and cost which defies calculation.

Taking the figures for the five years immediately preceding 1883, the returns are as follows:—

	1878	1879	1880	1881	1882
Number of accounts passed other than receivers' accounts	1930	2189	2388	2286	2172
Amount of receipts therein	£8,335,722	10,718,912	12,063,039	12,014,609	9,737,076

For the period of five years from 1891 to 1895, both inclusive, the results work out thus:—

	1891	1892	1893	1894	1895
Number of accounts passed other than receivers' accounts	1156	1089	991	948	893
Amount of receipts therein	£6,503,114	4,826,828	4,082,128	3,997,639	4,983,916

To some extent, no doubt, these results are due to the fact that the accounts of official liquidators were formerly, but are now no longer, dealt with in chambers. It is not possible to apportion the figures with any accuracy between the two classes of business; for the method of making up the returns appears not to have been uniform in all the chambers. In some, the accounts of official liquidators were included in the return entitled "Accounts other than Receivers' Accounts," though generally they were treated as receivers' accounts. After making all due allowance, however, for this consideration, it is unquestionable that the diminution in the particular class of business to which the figures quoted above relate has been largely brought about by the present reasonable mode of dealing with questions arising in the administration of estates.

The jurisdiction in chambers on the Chancery side of the High Court differs in some important particulars from that in the Queen's Bench or Probate, Divorce, and Admiralty Divisions. In the latter a master or registrar can transact all such business, and exercise all such authority and jurisdiction in respect of the same as may be transacted or exercised by a judge at chambers, with certain specified exceptions (R. S. C. Order 54, r. 12). An appeal lies from the decision of a master to a judge at chambers (*ibid.* r. 21). On the other hand, a master in the Chancery Division has no original jurisdiction similar to that of a master in the Queen's Bench Division. In theory every order made in chambers is that of the judge, even though in fact made by his deputy. No appeal lies to the judge from a decision of the master, but it is the absolute right of every suitor to have any point on which he is dissatisfied with the decision of the master adjourned to the judge (*Upton v. Brown*, 1882, 20 Ch. D. 731; *In re Watts, Smith v. Watts*, 1882, 22 Ch. D. 5). One result of this difference in the practice is this. A master or registrar in the Queen's Bench or Probate, Divorce, and Admiralty Divisions cannot entertain an application which is within the exceptions of Order 54, r. 12, but in such cases the summons is made returnable before the judge himself in the first instance. In the Chancery Division, on the other hand, every application comes before the master in the first instance,

and, subject to the suitor's right of adjournment to the judge, is completely dealt with by him, except in cases where, either by the terms of the rules, by express direction of the judge, or in the opinion of the master himself, it is necessary that the matter should be referred to the judge in person.

The judge sits on one day in every week to dispose of cases adjourned to him from the master. Formerly he sat in chambers for this purpose; now the sittings are held in Court.

Orders made in chambers to be acted on by the Paymaster-General (*q.v.*) are, unless the judge otherwise directs, drawn up by the registrars. Every other order made in chambers is, unless the judge otherwise directs, drawn up by the master to whom the cause or matter in which the order is made belongs (R. S. C. 1883, Order 55, r. 74). Under the direction of the several judges the orders drawn up in chambers are generally confined to those relating to matters of procedure.

[Daniell, *Chancery Practice*, 6th ed.; Daniell, *Chancery Forms*, 4th ed., by C. Burney; *The Annual Practice*, 1897.]

**Chambers, Judges'.**—The origin of "Judges' Chambers"—as the common law chambers have always been designated—is wrapped in considerable obscurity. There are statutes and orders regulating from time to time the practice of Judges' Chambers, but they all appear to have been passed for the purpose of extending the previously existing power of the judges to make orders out of Court. There does not appear to be any statute directly creating such jurisdiction, which probably originated in custom, and grew in proportion to a gradually increasing demand for its exercise. The inconvenience and injustice occasioned by closing the Courts during the intervals between the legal terms appear to have induced the judges to make orders for time to plead, or to stay proceedings and other interlocutory orders, at times when the Courts were not sitting. These orders were made by the judges either at their own houses or in their chambers, and the practice must have existed as far back as the seventeenth century, for Lord Coke in 1669 expressed his disapproval of it, and even appears to have doubted the validity of orders so made. He says (2 Inst. 103), "The judges are not judges of chambers but of Courts, and therefore in open Court, where parties' counsel and attornies attend, ought orders, rules, awards, and judgments to be made and given, and not in chambers and other private places." Seeing, however, that at that time no one but a judge had power to make any order in a cause, and that the Courts remained closed for a considerable part of the year, it is not surprising that, in spite of Lord Coke's disapproval, the practice was retained, and gradually developed to meet the growing requirements of increasing litigation.

Nevertheless, it appears that as late as 1802 some ground for doubt remained as to the validity of orders made in chambers. Lord Justice Wilmot (Wilmot's Notes, 264) wrote as follows:—"A doubt has been rather hinted at than made as to the legality of orders made by judges at their houses or chambers. When the practice first began I cannot find out . . . But whenever it began it stands upon too firm a basis to be now shaken . . . and it is now become as much part of the law of the land as any other course of practice which custom has introduced and established."

In 1820 the work of Judges' Chambers received an implied sanction from Parliament, for by 1 Geo. IV. c. 59, s. 5, judges on circuit were empowered to "grant summonses and make orders" in actions depending in

the assize towns. The first direct statutory sanction given to the system of making orders in chambers was apparently in 1821. Prior to that time no attorney or other person could be summoned to attend the judge in his chambers during the sittings of the Court (Kidd, *Practice of the King's Bench*, 1828, 9th ed., p. 509), but in that year an Act was passed (1 & 2 Geo. IV. c. 16) abolishing that restriction, and providing for sittings in chambers at Serjeant's Inn between the terms. These sittings were subsequently extended by 3 Geo. IV. c. 103, which empowered the king to call upon the judges by warrant to sit in chambers on as many days in vacation as should seem fit, and the Law Terms Act, 1830, referred to *infra*, defined the limits of the jurisdiction which was to be exercised at chambers.

The work of Judges' Chambers has, until quite recently, suffered greatly from lack of regulation, due, no doubt, to the fact that until the Judges' Chambers Act was passed in 1867 no serious attempt was made to deal with chamber business as a whole. The judges used to sit in turn at Serjeant's Inn during term time from 3.30 p.m. till six, and frequently seven o'clock, and in vacation as often as they considered necessary. The rooms in Serjeant's Inn were so small, dark, and dilapidated, and the arrangements so discreditable, that in 1832 a debate on the subject took place in the House of Commons on the occasion of the presentation of a petition on behalf of the Incorporated Law Society for better accommodation. The Government were asked to provide a building which would combine a national gallery (!) and public record office with suitable offices for judicial chamber business, a request with which the Chancellor of the Exchequer declined to comply.

The present system of work in Queen's Bench Chambers is a continuation of that which was established in the three Common Law Courts by the Judges' Chambers Act, 1867, 30 & 31 Vict. c. 68, which provided that the masters should sit in chambers and deal, in the first instance, subject to the right of appeal to the judge, with all the judges' business, except that which affected the liberty of the subject. This Act was followed by the *Regular Generales* of Michaelmas Term, 1867, which placed considerable restrictions on the jurisdiction of the master in chambers. Some of these restrictions have since been removed and some others added by subsequent enactments. For further information respecting the extent of the jurisdiction of a master in chambers, see MASTERS OF THE SUPREME COURT.

*Jurisdiction in Judges' Chambers.*—As may be inferred from the foregoing sketch of the gradual growth of chamber business, the jurisdiction exercised in chambers remained indefinite until the beginning of the present century, when, for the first time, statutory authority was given to the practice of making orders in chambers. Sec. 4 of the Law Terms Act, 1830, 11 Geo. IV. & 1 Will. IV. c. 70, defines the jurisdiction exercisable in chambers as follows:—"To transact such business at chambers or elsewhere depending in any of the said Courts (King's Bench, Common Pleas, and Exchequer) as relates to matters over which the said Courts have a common jurisdiction, and as may according to the course and practice of the Court be transacted by a single judge." That definition of the limit of jurisdiction in chambers has, in principle, remained unaltered ever since. The several jurisdictions of the three Common Law Courts are now vested in the Queen's Bench Division of the High Court, and the power of a single judge has undergone certain changes, but the principle remains that whatever jurisdiction a single judge of the Queen's Bench Division has power to exercise, may, as a rule, be exercised in chambers. Sec. 39 of the Judi-

capture Act, 1873, preserves the jurisdiction exercised in chambers prior to that Act, and adds a power to exercise such further jurisdiction as may be directed or authorised by rules of Court to be thereafter made.

Perhaps the most complete definition of a judge's jurisdiction in Queen's Bench Chambers is that given in Chitty's Archbold's *Practice of the Queen's Bench*, 14th ed., p. 1401, which must be read as if the term "judge" included the term "master" in all matters except those specifically removed from a master's jurisdiction by Rules of the Supreme Court, 1883, Order 54, r. 12. See MASTERS OF THE SUPREME COURT.

"Practically a judge at chambers has jurisdiction in all cases where his jurisdiction is not excluded expressly, or by necessary implication, by some rule or statute. Except under very special circumstances, where both the Court and judge have jurisdiction, the application should be made to the latter (*Bowen v. Evans*, 1849, 18 L. J. Ex. 38). Where a statute expressly or impliedly directs that the application should be made only to the Court, a judge has no power to interfere, and *vice versa*. But when a statute in general terms, and without any special limitation, either expressed or to be inferred from its terms, gives any power to the Court, that power may be exercised by a judge at chambers. When the expression 'Court or a judge' is used in the Rules of the Supreme Court, a judge at chambers has jurisdiction; but when the expression 'the Court' alone is used he has not." See COURT OR A JUDGE.

For a list of all matters dealt with in Queen's Bench Chambers, and the practice relating thereto, see *Practice at Judges' Chambers*, by Archibald and Vizard.

**Chambers of Commerce.** — Associations of merchants, manufacturers, capitalists, and others concerned with commerce established in many towns and districts for the protection and promotion of mercantile and industrial interests in general, but particularly of those in which the town or district itself is most directly concerned. Their chief object is to obtain and communicate to their members useful information relating to commercial matters, and to take united action in regard to public measures which affect the interests of commerce and manufacture. Thus their reports and discussions are concerned with such subjects as the foreign trade of the country, and the treaties by which it is affected; the reports of consuls and of commissions on trade, commerce, and labour; legislation affecting either the home or foreign trade or the relations of employers and employed; and of recent years the condition of legal business in the Courts, the establishment of commercial Courts or tribunals, the extension of the jurisdiction of the County Courts, and the arrangements for the holding of circuits and continuous sittings in provincial towns of judges of the High Court, have formed frequent subjects for their consideration, and upon which they have represented their views to the public authorities. During the last few years they have taken a most important part in the establishment of boards of conciliation, with the object of mediating in disputes between employers and workmen, and the institution of chambers of arbitration for the settlement by arbitration of disputes arising out of commercial transactions, whether referred to them by voluntary reference, or submitted to them by the Courts of law. The chief example of this latter action on the part of the Chambers of Commerce is the London Chamber of Arbitration, which was appointed through the joint action of the corporation of the city, and the London Chamber of Commerce. (See



CONCILIATION and ARBITRATION; LONDON CHAMBER OF ARBITRATION.) But many of the chambers themselves make provision, under rules of procedure which vary in the different chambers, for the settlement by arbitration of disputes through committees of their own body. The Chambers of Edinburgh, Dundee, and Glasgow are incorporated by Royal Charter; others are incorporated and registered under the Companies Acts, 1862 to 1880, and licensed by the Board of Trade as companies limited by guarantee, but with the right to omit the word "limited" from their title under sec. 23 of the Companies Act, 1867, 30 & 31 Vict. c. 131. Other chambers are not in any way incorporated, registered, or licensed.

An account of the composition of fifty-five chambers of commerce, of their meetings and procedure, their funds and subscriptions, and officers, with other matters, is to be found in a memorandum to the Rules of Associations of Employers and Employed, issued by the Royal Commission on Labour, p. xxxii.

**Champerty.**—*Definition.*—Champerty is a species of maintenance (*q.v.*). It is maintenance in consideration of an interest in the subject-matter of the action to be maintained. Coke (Co. Lit. 368 (*b*)) defines it thus: "To maintain to have part of the land, or anything out of the land, or part of the debt, or other thing in plea or suit" is champerty. He says it is the worst of all maintenances, and is an offence, and is actionable at the common law (2 Inst. 208), and under the statute *Articuli Super Cartas* (28 Edw. I. c. 11) (2 Inst. 563).

1. *Statutes: Sale of Right of Entry.*—Champertous bargains are forbidden, and champerty is made punishable by a number of old statutes (Stat. Westm. I. c. 25 and 28; Stat. Westm. II. c. 49; *Articuli Super Cartas*, 28 Edw. I. c. 11; 33 Edw. I. stat. 3; 1 Edw. III. stat. 2, c. 14; 1 Rich. II. c. 4; 7 Rich. II. c. 15; and 32 Hen. VIII. c. 9). They are all said to have been passed in affirmance of the common law (see Coke, *ubi supra*, *Partridge v. Strange*, 6 Edw. VI., Plowden at p. 88). By the last of them (32 Hen. VIII. c. 9, see Co. Lit. 369 (*a*)), buying or selling "pretensed rights or titles" to lands is forbidden, unless the vendor or his predecessor in title has been in possession of the lands, or the reversion or remainder thereto, or the rents and profits thereof, for a year, under penalty of forfeiture, and the bargain is declared to be void. This statute forbade all dealings with rights of entry to land, except by release to the person in possession (as to which there was a saving clause); but except so far as it related to fictitious rights, the prohibition has been repealed by the Real Property Amendment Act, 1845, 8 & 9 Vict. c. 106, s. 6; *Jenkins v. Jones*, 1882, 9 Q. B. D. 128; and since the last-mentioned statute, in order to enforce a forfeiture against the buyer of a right of entry, the plaintiff must show that the buyer knew that his title was bad in part (*Kennedy v. Lyell*, 1885, 25 Q. B. D. 491).

2. *Bargains void for Champerty.*—In setting aside or refusing to enforce sales, mortgages, agreements, and other transactions on the ground of champerty, the Courts have gone beyond the strict limits within which the action for damages for maintenance, or the crime of maintenance, was confined under the statutes referred to, or at common law. It is sufficient that the transaction should "savour of champerty," and accordingly be "against the policy of the law" (*Rees v. De Bernardy* [1896], 2 Ch. 437; and see the cases collected by Kay, J., in his judgment in *James v. Kerr*, 1889, 40 Ch. D. at pp. 456–458; Pollock on *Contracts*, 6th ed., p. 321). The following rules may be deduced from the authorities to determine under

what circumstances a transaction will be held to savour of champerty (see Pollock, p. 321, and cp. the rules there given).

3. *Payment according to the Result of Litigation*.—A bargain, whereby one party to the bargain is to assist the other in recovering property, and is to share in the proceeds of the action, is illegal (per Blackburn in *Hutley v. Hutley*, 1873, L. R. 8 Q. B. 112), whether the action is already in progress or is agreed to be instituted (*Sprye v. Porter*, 1856, 7 El. & Bl. 58), or is only contemplated by the parties. And such a bargain is not less contrary to the policy of the law, and therefore voidable, because the property is in the hands of trustees or in Court, and no hostile action may be necessary to recover it (per Romer in *Rees v. De Bernardy* [1896], 2 Ch. at p. 449; *Strange v. Brennan*, 1846, 15 Sim. 346, aff. 2 Coop. t. Cott. 1). An agreement to communicate information which may be the means of enabling the person entitled to property to recover it, is not within the mischief aimed at, so as to be voidable if the remuneration takes the form of a share in the property when recovered (*Rees v. De Bernardy*, *supra*; *Sprye v. Porter*, *supra*), unless it is a term of the agreement that the person who is to give the information shall himself recover the property, or actively assist in the recovery of it (*l.c.c.*). And in considering whether such a term was really agreed upon, the Court will not allow the question to be concluded by the actual language used, or even by a written agreement deliberately drawn so as to exclude such a term. Thus in *Rees v. De Bernardy*, *supra*, the defendant, who was a next-of-kin agent, “and was well versed in the law of champerty,” had endeavoured to make it appear that the reward promised him was for the disclosure of information only, and had advised the other parties to go to, and they had, in fact, employed a solicitor. The agreement was nevertheless held to be champertous.

The assistance bargained for may be the supply of funds to procure evidence or legal assistance (*Hutley v. Hutley*, *supra*), or the evidence (*Sprye v. Porter*, *supra*) or legal assistance (see below, 5.) itself.

The special circumstances of a common interest in the action, or the relationship of the parties, which are held to justify maintenance (*q.v.*), do not make a champertous agreement valid. Thus in *Hutley v. Hutley*, 1873, L. R. 8 Q. B. 112, an agreement that, in consideration of a promise by the defendant to give him half the estate to which the defendant was heir-at-law, the plaintiff would take steps to get a will set aside, was held to be void, notwithstanding that the parties were cousins, and that the will purported to revoke an earlier will under which the plaintiff claimed a legacy. In the later case of *Guy v. Churchill*, 1888, 40 Ch. D. at p. 490, however, Chitty, J., said that the agreement in *Hutley v. Hutley* was based upon the assumption of the plaintiff having no interest, the earlier will being obviously treated as a nullity; and he added, “I know of no case where, the actual interest of the parties being sufficient to justify maintenance, the transaction has been avoided merely because they agreed to divide the subject-matter of the litigation among themselves, or some of themselves, in a manner not in accordance with their actual title.” The suggestion of this dictum is in conflict with the judgments in *Hutley v. Hutley* (see also *Cholmondeley v. Clinton*, 1821, 4 Bli. 1; 22 R. R. 84).

4. *Purchase of Property pendente lite*.—The sale of property while the title to it, or to part of it, is in dispute, or is the subject of litigation, is not illegal, unless the agreement is champertous, that is to say, unless it is in reality a sale of part of the property in consideration of the purchaser recovering, or assisting to recover, the rest for the vendor. The distinction is that the sale of an interest to which a right to sue is incident is good, but

the sale of a mere right to sue is bad (*Dickinson v. Burrell*, 1866, L. R. 1 Eq. 337, per Romilly, M. R., at p. 343; *Prosser v. Edmonds*, 1835, 1 Y. & C. Ex. 481; Pollock, p. 325); so that the purchase of an estate for the purpose of setting aside a previous agreement affecting the property on the ground of fraud, will not be enforced in equity because it partakes of the nature of champerty (*De Hoghton v. Money*, 1866, L. R. 2 Ch. 164).

But the Bankruptcy Acts allow the trustee of a bankrupt to sell rights of action as well as the bankrupt's other property (*Seear v. Lawson*, 1880, 15 Ch. D. 426), and exempt such sales from the objection arising on the ground of champerty, at any rate if the purchaser is one of the creditors. So that an assignment by the trustee to some of the creditors of the cause of action, in an action commenced before the bankruptcy, on the terms that the purchasers should proceed with the action, and, if successful, pay over part of the proceeds to the trustee, was upheld (*Guy v. Churchill*, 1888, 40 Ch. D. 481).

5. *Dealings between Solicitor and Client.*—Objections on the ground of champerty are maintained with special stringency where the purchaser or promisee is a solicitor (see also as to the dealings under consideration, FIDUCIARY RELATIONSHIP AND SOLICITOR).

Any purchase of the subject-matter of the action by a solicitor who is engaged in carrying on the action, whether as the solicitor on the record or not, from his client, is voidable at the client's option (*Simpson v. Lamb*, 1857, 7 El. & Bl. 84). So is a mortgage for money to enable the client to sue, which is to be repaid with a large bonus if the action succeeds (*Jones v. Kerr*, 1888, 40 Ch. D. 449). In the last case the lender was not employed as solicitor himself, but he had stipulated that his nominee should be so employed. But a mortgage of the subject-matter for a debt to the solicitor for costs or advances already earned or made, is not champertous or illegal (*Anderson v. Radcliffe*, 1860, 29 L. J. Q. B. 128; El. B. & E. 806). See the Solicitors Act, 1870, s. 11, cited below.

The purchase or other transaction can only be set aside on the application of the client or his representatives (*Knight v. Bowyer*, 1858, 2 De G. & J. 421). A purchase before the relationship of solicitor and client exists, by one who afterwards is employed as the vendor's solicitor in the action, is, of course, not within the rule against champerty (*Davis v. Freethy*, 1890, 24 Q. B. D. 519).

A solicitor cannot bind his client by an agreement in the event of success to pay him a higher rate of costs (*Earle v. Hopwood*, 1861, 9 C. B. N. S. 566). Thus it has been held that a contract by the client to pay his solicitor a percentage on the sum recovered is champertous (*Hilton v. Woods*, 1867, L. R. 4 Eq. 432; *In re "Attorneys and Solicitors Act, 1870,"* 1875, 1 Ch. D. 573). The Act of 1870, which allows agreements to be made as to costs under certain conditions, expressly provides (s. 11) that nothing contained in it shall be construed to give validity to any purchase by a solicitor of the interest, or part of the interest, of his client in any suit, action, or other contentious proceeding, or to give validity to any agreement by which a solicitor employed to prosecute any suit or action stipulates for payment only in the event of success.

A solicitor who has received moneys to conduct an action from persons who are maintaining his client's proceedings, cannot set up the illegality in answer to an application to tax (*In re Thomas* [1894], 1 Q. B. 747).

6. *Confirmation and Acquiescence.*—An agreement by way of confirmation which is itself affected by champerty, or any acquiescence in, or recognition of, the champertous bargain without knowledge of the right to have it set aside, is inoperative to prevent the Court annulling it (*Rees v. De Bernardy*

[1896], 2 Ch. 437; *Wood v. Downes*, 1811, 18 Ves. 120; 11 R. R. 160; and cp. on this head ACQUIESCENCE and CATCHING BARGAINS.

As to actions for damages, and criminal proceedings in respect of *cham-perty*, see MAINTENANCE.

**Chance—Chance Medley** (French, *chance medlée* or *meslée*, also derived from *chaude mêlée*).—An old term of English law not now often used, but originally applied to describe a defence to murder which reduced it to homicide by misadventure or manslaughter. The ancient meaning of homicide by chance medley was death ensuing from a combat between the parties upon a sudden quarrel or sudden casual affray in hot blood, as distinguished from homicide by malice prepense, or homicide in a duel after challenge (see DUEL). In an Act of 1530 (22 Hen. VIII. c. 14, s. 4) sanctuary was allowed to a man after previously having taken sanctuary for "manslaughter by chance medley," which is there distinguished from "murder out of malice prepensed." And in an Act of 1532 (24 Hen. VIII. c. 5) where the term is used, the view of the law there held seems to have been that killing in chance medley was not excusable homicide, but homicide with a minor degree of culpability, as it is stated that a person forfeited goods and chattels who, "by chance medley, should happen to kill or slay any person in his or their defence." It is therefore not quite the same as homicide *per infortunium*, or by misadventure, in which the killer is entitled to acquittal; but nearly allied to or identical with manslaughter, the fact of sudden quarrel excluding the element of malice prepense, but as a breach of the peace also excluding the element of absolute misadventure. Foster is of opinion (*Crown Law*, 276) that to make good the defence, it was necessary to show that the accused retreated from the combat before a mortal wound was given, and afterwards inflicted such wound to save his own life. The Act of 1532 was repealed in 1828 (9 Geo. IV. c. 31, s. 1); and while by sec. 7 of the Offences against the Person Act, 1861, 24 & 25 Vict. c. 100, the defences of homicide by misfortune or in self-defence are preserved, long before this period the distinction between homicide in chance medley and manslaughter had been obliterated by the judicial rulings, collected in Hawk., P. C., bk. i. c. 31, ss. 21, 40.

There was undoubtedly some confusion as to the meaning of the word. In *Woodburn's case*, 1722, 16 St. Tri. 54, at p. 80, inadvertently shooting a man while shooting a wild-fowl is said not to be felony but misadventure or chance medley, because it was an accident that happened in the doing of a lawful act. This is erroneous (see 4 Black. Com. 184). Hawkins, P. C., bk. i. c. 29, s. 8, cites a case where, while a person was assisting a gamekeeper who was lawfully seizing poachers, his gun went off and killed a poacher, and says that it was adjudged chance medley, as the owner of the gun was not a trespasser. But in c. 30, s. 1, he defines chance medley as killing in a sudden quarrel, or in the commission of an unlawful act without any deliberate intention of doing any mischief at all, and as an offence to which there cannot therefore be any accessories.

[For authorities, see Co. Litt. 287 b; 3 Co. Inst. 57; 1 Hale, P. C. 453; Foster, *Crim. Law*, 275; Hawk., P. C., bk. i. cc. 29–31; Mayne, *Crim. Law of India*, 1896, 609, 610; 3 Russ. on *Crimes*, 6th ed., 206, 207.]

**Chancel.**—The chancel is the part of the church in which the altar or communion table stands, and where the services of the church are

performed. The word chancel seems probably to be derived *a cancellis*, i.e. lattice-work partition between the choir and the body of the church. The chancel is called the choir in cathedral and collegiate churches. By the rubric before the order for morning and evening prayer it is ordained, "That the chancels shall remain as they have done in time past," that is, distinguished from the body of the church by a frame of open work (Gibbs. *Cod.* i. 197), as was the case before the Reformation.

This, it is submitted, is still the law, although as a matter of practice it has not been considered imperative in faculties issued since the date of the rubric to require the chancel to be separated from the nave by a chancel screen. A question arose in modern times as to whether gates could legally be placed to a chancel screen in a parish church. In *Beal v. Liddell* (1855, Moore's Special Report, at p. 77), in the Consistory Court of London, Dr. Lushington refused to order the removal of a chancel screen and brazen gates in the church of St. Barnabas, Pimlico, which were there at the time of its consecration, on the ground that they were not clearly contrary to law; but he added that such separations between chancel and nave were in his opinion objectionable, and that he should not advise a bishop to consecrate a church so fitted up. In *Bradford v. Fry*, 1878, 4 P. D. 93, Lord Penzance, judge of the Arches Court, confirmed a faculty issued by the ordinary for the removal of such gates, which had then been erected without a faculty; and *In re St. Augustine, Haggerston*, 1874, 4 P. D. 112, before the Consistory Court of London, Dr. Tristram, refused to grant a faculty for their erection. But *In re St. Agnes, Toxteth Park*, 1885, 11 P. D. 1 (for a fuller report, see *Law Journal*, Nov. 28, 1885, p. 700), in the Consistory Court of Liverpool, the Rev. Dr. Espin granted a faculty for such gates, it being shown that the chancel, from its richness, required protection. On similar grounds a faculty was subsequently granted for a chancel screen with gates by Dr. Tristram in the Consistory Court of London on similar grounds (*In re St. John, Isle of Dogs*, 1888, Tristram's *Consistory Judgments*, p. 88, and subsequently *In re St. James, Norland* [1894], Prob. 256, and the *Vicar and Churchwardens of St. Peter's, Eaton Square v. Parishioners* [1894], Prob. 356). Such a faculty was, however, refused by the chancellor of the diocese of Rochester (*In re St. Margaret's*. See *Law Journal Notes* of November 3, 1887, p. 151), and by the chancellor of the diocese of St. Albans in the *Rector and Churchwardens of St. Andrews, Romford v. All Persons having interest, etc.* [1894], Prob. 220; *Vicar of Richmond and Others v. All Persons, etc.* [1897], Prob. 70; but granted by the chancellor of the diocese of Norwich in 1894 (*The Vicar and Churchwardens of St. John the Baptist, Timberhill v. The Rectors, Proprietors, Parishioners, etc., of the same* [1895], Prob. 71). \*

As to seats in the chancel, it may be stated that from the thirteenth century, though the contrary is stated or implied in some of the judicial decisions adverse to chancel gates (see *supra*), there is evidence that patrons and other lay persons of high position were allowed seats in the chancels (see Heales' *History and Law of Seats and Pews*, vol. i. pp. 66-70). It cannot be therefore considered that the right of the laity to sit in the chancel commenced with the Reformation. The right which a lay rector has to the chief seat in the chancel is one result of the dissolution of monasteries; the lay rector succeeding to the rights in the freehold of the chancel formerly enjoyed by the monastic corporations (see *Hall v. Ellis*, 7 Jac. Noy. p. 130).

The freehold of the chancel may be in the rector, lay or spiritual, as by a sort of legal fiction the freehold of the church is in the incumbent; but

the use of it belongs to the parishioners, and the ordinary, as protector of the rights not only of existing but of succeeding parishioners, must see that neither their present nor their future accommodation is unduly prejudiced (*Rich v. Bushnell*, 1827, 4 Hagg. 170). The reason for this is that prior to the dissolution of the monasteries the rector could not alienate the chancel without the consent of the ordinary; and the saving clause in the Act 31 Hen. VIII. c. 13, s. 4, leaves the matter as it was. Therefore in *Clifford v. Wicks*, 1818, 1 B. & Ald. 498, a grant of part of the chancel or the church to A., his heirs and assigns, was held invalid. And though the freehold of the church be in a lay rector, "this naked and abstract right" carries with it no right of possession, this being in the incumbent, who is responsible to the ordinary for the celebration of public worship therein, and therefore the lay rector has no right to prevent the vicar from having access to it by any of the doors (*Griffin v. Dighton*, 1864, 5 B. & S. 93).

A common law right to a seat in the chancel originally belonged to every vicar, for by a constitution of Archbishop Winchelsea the hours of the breviary were to be sung there every day. The changes made at the Reformation in no way interfered with this right, which all vicars must still possess, unless it appears they have quitted it. If they have not used the right for forty years, the fact raises a prescription against them in the ecclesiastical Courts.

As to seats in the chancel, though some doubt exists, the law appears to be that such seats are under the control of the ordinary in the same manner as seats in the rest of the church (see Gibson, *Cod.* p. 200; and the Ecclesiastical Commissioners in their Report, 1832, p. 49; see also Prideaux, *Churchwardens' Guide*, 11th ed., p. 294).

The lay rector is not entitled to, as of right, make a vault or affix tablets in the chancel without leave of the ordinary, nor is he entitled to a faculty for such purposes without laying before the ordinary such particulars as will afford the vicar and parishioners an opportunity of judging of it, and satisfy the ordinary that such vaults or tablets will not interrupt the parishioners in the use and enjoyment of the chancel, nor has the vicar any right of veto, though he may show cause against such leave being granted. It would appear that the consent of the lay rector must precede the leave of the ordinary for the construction of a vault or the erection of tablets in a chancel, and this is not merely because the freehold is in him, but because the burden of repair is on him (*Rich v. Bushnell*, *supra*).

The parson, whether appropriator, impropriator, or instituted rector, is bound of common right to repair the chancel. There is, however, some doubt as to the manner in which lay impropriators shall be compelled by the spiritual Court to do this, whether by spiritual censures or by sequestration, which was the remedy before the Act 31 Hen. VIII. c. 13 (Gibson, *Cod.* p. 198). The case came before the Courts twice in the reign of Charles the Second (*Anon.*, M. 29 Car. 2; 3 Keb. 829; *Wallwyn v. Auberry*, T. 32 Car. 2; 2 Vent. p. 35; 2 Mod. [254]).

Before the abolition of Church rates when there was more than one impropriator, it was customary for the churchwarden to call a vestry and sue them at the public expense. Such a suit may still be brought, though not at the cost of the parish, and the Court will admonish all parties who have received tithes or other profits to repair the chancel. It does not, however, appear that the churchwardens can first repair the chancel after giving notice to the lay impropriator, and subsequently compel him to refund the amount (see *Wallwyn v. Auberry*, *supra*). It is not necessary to make every impropriator a party.

The sequestrator of a rectory is bound to keep the chancel in repair (*Hubbard v. Beckford*, 1 Hag. Cons. 307).

The incumbent may cut down the trees in the churchyard for necessary repairs to the chancel. While at common right, as has been said, it is not the duty of the parishioners to repair the chancel, there may be a custom or prescription to charge them, and such custom prevails in the city of London, Norwich, and in other cities and large towns (*Hawkin's case*, 9 Will. III. 5 Mod. 390).

In some cases the vicar is bound by special composition to repair the chancel, and the effect of such composition is to vest the freehold of the chancel in him.

The churchwardens are charged with the supervisal of the chancel, to see that it does not fall into decay. If dilapidations be not repaired they are to make presentment at the next visitation. A chancel under the same roof with and open to the rest of the church, and appearing to be part of the same building, may be shown by evidence to be the property of a private person (*Churton v. Frewen*, 1866, L. R. 2 Eq. 634; see also *Duke of Norfolk v. Arbutnot*, 1879, L. R. 7 C. P. D. p. 290; 5 C. P. D. p. 390). As to ornaments annexed to a chancel screen, see CRUCIFIX; CROSS; ROOD.

[*Authorities*.—Lindwood, *Prov.*; Gibson, *Codex*; Johnson, *Clergyman's Vade mecum*; Prideaux, *Churchwardens' Guide*, 16th ed.; Steer, *Parish Law*; Shaw, *Parish Law*; Phillimore, *Ecclesiastical Law*, 2nd ed.]

**Chancellor.**—The Lord High Chancellor of Great Britain—as to title, see Macqueen, *House of Lords and Privy Council*, p. 20, and the Act of Union with Scotland—fills the oldest and most dignified of the great lay offices of the Crown. He takes precedence of all temporal peers except the king's sons (31 Hen. VIII. c. 10), and, by the Statute of Treasons, it is high treason to kill him. Since Lord Thurlow's time his office has been always regarded as beyond question a party office, and he is invariably a member of the Cabinet of the day, and resigns with it on a change of the Government. He was, together with the Lord-Lieutenant of Ireland, excepted from the Roman Catholic Relief Act, 1829, and notwithstanding the repeal of the Test Act by the Statute Law Revision Act of 1863, it is believed that neither office can be held by a Roman Catholic (Anson, *Law of the Constitution*, vol. ii. p. 132; see Hansard, vol. 349, col. 1734). The Chancellor takes both the oath of allegiance and the judicial oath (31 & 32 Vict. c. 72).

*Custodian of the Great Seal.*—The dignity and authority of the Lord Chancellor have been chiefly derived from his position as Custodian of the Great Seal. He is appointed by having the seal delivered to him by the Crown, and may be dismissed by its resumption. His office is not determined by the demise of the Crown, but he may continue, notwithstanding the king's death, to exercise it and to affix the Great Seal (6 Anne, c. 41, s. 9).

All writs, including summonses to Parliament, and writs for the commencement of actions at law, proclamations, charters, royal grants and patents, and other Crown documents requiring to be sealed with, or to be issued under, the authority of the Great Seal, were formerly issued from the Chancery, of which, as custodian of the Seal, the Lord Chancellor was head; and the business of sealing and issuing these documents formed a chief part of the duties of what was known as the common law side of the Court of Chancery. So far as writs and other documents connected with the administration of justice are concerned, this business has been removed from

the Chancery to the Central Office, established under the Judicature Acts (see Order 61, and the Great Seal (Offices) Act, 1874, by which the business of the "Petty Bag Office" was divided up). The writs by which actions are now commenced have not, since the Common Law Procedure Acts, been issued under the Great Seal. The remainder of the ministerial business of the common law side of the Court of Chancery has been transferred to the office of the clerk of the Crown in Chancery (see the Great Seal (Offices) Act, 1874, and the Crown Office Acts of 1877 and 1890). By the Act of 1877, just cited, the use of a Wafer Great Seal is authorised, upon such documents as the Lord Chancellor, the Lord Privy Seal, and a Secretary of State prescribe. The authority for passing under the Great Seal of the United Kingdom, any instrument which may not be passed by the fiat or under the authority of the Lord Chancellor without passing through any other office, was prescribed to be a warrant under the Royal Sign Manual, countersigned as provided by the Act. And the Lord Chancellor was empowered to make regulations from time to time respecting the passing of instruments under the Seal, and the preparation of warrants. The judicial business of the common law side of the Court of Chancery, along with the much more important business of its equity side, was transferred to the High Court of Justice by the Judicature Acts. See CHANCERY DIVISION.

*President of the House of Lords.*—The Lord Chancellor is by prescription Speaker or Prolocutor of the House of Lords (Lord Ellesmere's *Office of the Lord Chancellor*) whether he be a peer or not, and although in modern times the Chancellor is always raised to the peerage, he has frequently presided before the patent creating his peerage has been completed (May's *Parliament*, 10th ed., p. 184; Macqueen, p. 23). He is required by the Standing Orders of the House to be always in attendance at its sittings, but has little or no authority in the debates. The Standing Orders direct him to speak covered, and "not to adjourn the House, or to do anything as the mouth of the House, without the consent of the Lords first had, except the ordinary thing about bills which are of course, in which the Lords may likewise overrule, as for preferring one bill before another and such like, and in case of difference among the Lords, it is to be put to the question, and if the Lord Chancellor will speak anything particularly he is to go to his own place as a peer" (S. O. 20). When presiding, he sits upon the woolsack, which is supposed to be not within the House (Macqueen, p. 24); but the place referred to as his own is on the left below the places of the Royal dukes (31 Hen. VIII. c. 10, s. 4). He puts the question and appoints tellers, but he is not addressed in debate, and has no power to decide between different speakers who rise together, or to rule on points of order (May). He does not preside at trials of peers for treason or felony, unless he happens to be appointed Lord High Steward. He does, however, preside, as on ordinary occasions, upon the impeachment of a commoner.

*Patronage.*—He is conservator and justice of the peace throughout England by prescription, and visitor of all hospitals and free chapels which be of the foundation of the king or his progenitors (Ellesmere). He is also patron of all the Crown livings under the value of £20 per annum in the king's books (Blackstone). The author just cited adds that "he is the general guardian of all infants, idiots, and lunatics; and has the general superintendence of all charitable uses in the kingdom" (iii. p. 47). But these duties and jurisdiction, and also the important bankruptcy jurisdiction of the Chancellor, have been assigned by modern statutes to other offices, or committed to the judges of the High Court or the Lords Justices. (See INFANTS; LUNACY; and CHARITIES.)



*Judicial Duties.*—The Lord Chancellor, as head and sole judge of the Court of Chancery, was formerly, down to the transfer of the jurisdiction of that famous Court to the new High Court of Justice, the most important judicial officer of the country, and he is still the head and first representative of the law in England. By custom, all Government measures relating to the administration of justice are regarded as falling into his department of the Cabinet work (Campbell). Writs of summons are tested in his name (Order 2, r. 7). The judges of the High Court, other than the Lord Chief Justice, who is appointed on the nomination of the Prime Minister, are selected by him. He appoints the judges of the County Courts (except in districts within the Duchy of Lancaster), and he has power to remove them for inability or misbehaviour (County Courts Act, 1888, ss. 8 and 15). He has also other judicial patronage, and extensive powers of making rules under particular Acts have been conferred upon him either alone or in conjunction with the judges. The principal judicial duty which is now regularly exercised by the Lord Chancellor is that of presiding upon the hearing of appeals to the House of Lords. But he is also, *ex officio*, a member of the Court of Appeal, and, when he sits, its president (Judic. Act, 1875, ss. 4, 6), and a judge of the High Court of Justice (Judic. Act, 1873, s. 100). He continues, notwithstanding his retirement, to be a member of the Court of Appeal (Judic. Act, 1891, s. 1), but he is not required to sit and act as a judge of that Court unless, upon the request of his successor, he consents to do so.

The Great Seal was formerly at times committed to a Lord Keeper or to Commissioners, and he (5 Eliz. c. 18) or they had the same jurisdiction and powers as the Lord Chancellor.

The remuneration of the Lord Chancellor is £10,000 a year, and a retiring pension of £5000 for life. Upon the adoption of a fresh Seal at the commencement of a new reign, the holder of the old Seal for the time being is entitled to retain it as his own property (see the account of the dispute between Lord Brougham and Lord Lyndhurst for George IV.'s Seal in Campbell, p. 23).

(See Lord Ellesmere's *Office of the Lord Chancellor*, Blackstone, iii. p. 46, and the Introduction to Lord Campbell's *Lives of the Chancellors*. For the history of the Chancellor's office and of the Court of Chancery, see Campbell's *Lives* and Kerly's *History of the Equitable Jurisdiction of the Court of Chancery*.)

**Chancellor (of a Cathedral Church).**—One of the four dignitaries or "Greater Persons" (Dean, Precentor, Chancellor, and Treasurer) always found in English cathedral churches of the Old Foundation (see DEAN AND CHAPTER). These churches are thirteen in number, namely, York, St. Paul's, Lincoln, Lichfield, Hereford, Wells, Exeter, Salisbury, Chichester, St. David's, Llandaff, Bangor, and St. Asaph. The office is also found in the cathedral church of Truro, which, though founded under the Truro Chapter Act, 1878, 41 & 42 Vict. c. 44; is modelled on the lines of the old foundations, and in the collegiate church of St. Saviour, Southwark, refounded Feb. 1897, under the canonical authority of the Bishop of Rochester.

The chancellor's primary duty was to act as the seal-keeper of the chapter, but in course of time the office came to include a general superintendence of education, and especially of theological study within the capitular body, and occasionally throughout the diocese. Hence the revival

at Lincoln and Truro of late years of theological colleges called *Scholæ Cancellarii*, of which the chancellor is the official head. The office must not be confounded with that of chancellor of a diocese, with which it has no connection.

**Chancellor (of a Diocese).**—See CONSISTORY COURT; OFFICIAL PRINCIPAL; VICAR-GENERAL.

**Chancellor of a University.**—See UNIVERSITIES.

**Chancellor of The Duchy of Lancaster.**—See LANCASTER, COUNTY PALATINE OF.

**Chancellor of the Exchequer.**—Under the date 18 Hen. III., Madox (*Hist. Exchequer*, xxi. 3) records the appointment of an officer to reside at the Exchequer, and to keep a counter-roll of proceedings there. The Chancellor of the Exchequer discharged certain judicial functions, and in later times he sat with the Barons of the Exchequer when they sat as a Court of equity. Sir R. Walpole sat and gave a casting vote in 1735; but since that time the Chancellor has not taken his place with the judges, except on ceremonial occasions, such as the annual meeting for the nomination of sheriffs. When the Chancellor's office is vacant, the seals are in the custody of the Chief Justice of England.

Since the reign of Henry VII. the office of Chancellor of the Exchequer has been combined with that of Under Treasurer; and at the present time the holder of these two offices is recognised as the finance minister of the United Kingdom. He is always a member of the Cabinet, and is responsible in all matters relating to public revenue and expenditure. In November and December of every year the estimates of the spending departments are sent to the Chancellor of the Exchequer for consideration and revision. Having thus ascertained the probable expenditure of the coming financial year (which begins on 1st April), he is able in March or April to place the figures before the House of Commons, and to open his Budget of plans for the year. If his prospective revenue is greater than his estimated expenditure, he has a (prospective) surplus, which justifies him in remitting taxation, or in sanctioning additional expenditure. If, on the other hand, the estimated revenue falls short of estimated expense, there is a (prospective) deficit, which must be made good by curtailing expense, or by opening some new source of revenue.—[See Sir W. Anson, *Law of the Constitution*, ii. 175.]

**Chancery** in diplomatic language is the office at an embassy, legation, or consulate in which official correspondence is recorded and kept. It is also used as a synonym for the archives themselves.

**Chancery, Court of.**—See CHANCERY DIVISION; CHANCELLOR, SUPREME COURT.

**Chancery Courts of Durham, Lancaster, York.**

—See DURHAM, LANCASTER, YORK.

**Chancery Division.**—Upon the Judicature Act, 1873, coming into operation (which was on the 1st of November 1875) the High Court of Chancery of England and the other then existing Courts of law and equity (except the Court of Bankruptcy, which was subsequently included by sec. 93 of the Bankruptcy Act, 1883) were united and consolidated together into one Supreme Court of Judicature in England (J. A., 1873, s. 3), consisting of two permanent Divisions: Her Majesty's High Court of Justice, exercising original jurisdiction, with certain appellate jurisdiction from inferior Courts; and Her Majesty's Court of Appeal, exercising appellate jurisdiction, with certain original jurisdiction incident to the determination of appeals (J. A., 1873, s. 4). The High Court of Justice was constituted as a Superior Court of Record, and the jurisdiction transferred to and vested in the High Court included (with certain exceptions, referred to below) the jurisdiction which at the commencement of the Judicature Act, 1873, was vested in, or capable of being exercised by, the High Court of Chancery, as a common law Court as well as a Court of equity, including the jurisdiction of the Master of the Rolls as a judge or master of the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a common law Court; and also the jurisdiction which, at the commencement of the Act, was vested in, or capable of being exercised by, all or any one or more of the judges of the High Court of Chancery, sitting in court or chambers, or elsewhere, when acting as judges or a judge in pursuance of any statute, law, or custom, and all powers given to such Court, or to any such judges or judge, by any statute, and also all ministerial powers, duties, and authorities incident to any and every part of the jurisdiction so transferred (J. A., 1873, s. 16). The exceptions to the transfer of jurisdiction above mentioned included the following: (1) any appellate jurisdiction of the Court of Appeal in Chancery, or of the same Court sitting as a Court of Appeal in Bankruptcy (*q.v.*); (2) any jurisdiction usually vested in the Lord Chancellor or in the Lords Justices of Appeal in Chancery, or either of them, in relation to the custody of the persons and estates of idiots, lunatics, and persons of unsound mind (see LUNACY); (3) any jurisdiction vested in the Lord Chancellor in relation to grants of letters patent, or the issue of commissions or other writings to be passed under the Great Seal of the United Kingdom; (4) any jurisdiction exercised by the Lord Chancellor in right of or on behalf of Her Majesty as visitor of any college, or of any charitable or other foundation; (5) any jurisdiction of the Master of the Rolls in relation to records in London or elsewhere in England (J. A., 1873, s. 17). In the Act the expression "the High Court of Chancery" includes the Lord Chancellor (J. A., 1873, s. 100). The jurisdiction so transferred to the High Court of Justice is co-extensive with the old equity jurisdiction.

For the more convenient dispatch of business the High Court of Justice was divided into five Divisions, which were subsequently reduced by Order in Council (under J. A., 1873, s. 32) to three, namely, the Chancery Division, the Queen's Bench Division, and the Probate, Divorce, and Admiralty Division (J. A., 1873, s. 31). On the commencement of the Act the Chancery Division consisted of the following judges: the Lord Chancellor (the president thereof), the Master of the Rolls, and the Vice-Chancellors of the Court of Chancery. The Master of the Rolls ceased to be a judge of

the High Court (see J. A., 1881, s. 2), and a judge attached to the Chancery Division was appointed to supply the vacancy (J. A., 1881, s. 5); and power to appoint an additional judge was given, so as to make due provision for the business of the Chancery Division (see J. A., 1877, s. 2, and J. A., 1881, s. 6), under which a fifth judge was appointed.

Every cause or matter which at the commencement of the Judicature Act, 1873, was depending in the Court of Chancery was, subject to the power of transfer, assigned to the same judge in or to whose Court the same was depending or attached at such commencement; and every cause or matter which after such date might be commenced in the Chancery Division was directed to be assigned to one of the judges thereof (J. A., 1873, s. 42).

All officers who, at the time when the Rules of the Supreme Court, 1883, came into operation (that is, on October 24, 1883), were attached to the Chancery Division remained attached to that Division (Order 60, r. 1, substantially the same as the corresponding rule of R. S. C., 1875).

The business assigned to the Chancery Division was as follows: (1) All causes and matters pending in the Court of Chancery at the commencement of the Act; (2) all causes and matters to be thereafter commenced under any Act by which exclusive jurisdiction, in respect to such causes or matters, was given to the Court of Chancery, or to any judges or judge thereof respectively, except appeals from County Courts; (3) all causes and matters for any of the following purposes: the administration of the estates of deceased persons; the dissolution of partnerships or the taking of partnerships or other accounts; the redemption or foreclosure of mortgages; the raising of portions or other charges on land; the sale and distribution of the proceeds of property subject to any lien or charge; the execution of trusts, charitable or private; the rectification, or setting aside, or cancellation of deeds or other written instruments; the specific performance of contracts between vendors and purchasers of real estates, including contracts for leases; the partition or sale of real estates; the wardship of infants and the care of infants' estates (J. A., 1873, s. 34). The business so assigned to the Chancery Division is a part only of the old equity jurisdiction transferred to the High Court as above mentioned (see per Jessel, M. R., in *Rogers v. Jones*, 1877, 7 Ch. D. at p. 349). A cause or matter wrongly assigned to any Division of the High Court may be retained in such Division or transferred to the proper Division as the judge thinks fit (J. A., 1875, s. 11 (2); and see J. A., 1873, s. 36). An application to the wrong Division may be punished by costs (see *In re Pollard*, 1888, 20 Q. B. D. 656). The Chancery Division now consists of the Lord Chancellor, who is the president thereof, and five puisne judges, who are styled Justices of the High Court (J. A., 1877, s. 4). Every cause or matter commenced in the Chancery Division must be assigned to and marked with the name of one of the judges thereof to whom for the time being chambers are attached. The name of the particular judge to whom the assignment is to be made is ascertained by a system of rotation, and the plaintiff has no longer the right, which he could exercise under the Judicature Act, 1873, and the former rule of Court, of selecting the judge (see J. A., 1873, s. 42; R. S. C., 1875, Order 5, r. 4; R. S. C., Order 5, r. 9). Chambers are attached to the four senior puisne judges of the Chancery Division; to the fifth judge certain causes and matters are from time to time transferred for the purpose only of trial or hearing, and no cause or matter is to be assigned to such judge by the same being marked with his name (see Order 49, rr. 1 and 2). In case of such transfer the original and any further hearing takes place before

the judge to whom the cause or matter has been transferred, but all other proceedings therein, whether before or after the hearing or trial, must be taken and prosecuted as if no transfer had been made, except as may be specially directed by the judge to whom the transfer is made. When inquiries are directed at the hearing and further consideration is reserved, such further consideration is usually taken by the judge to whom the action was originally assigned.

Causes or matters in the Chancery Division commenced in the district registries of Liverpool and Manchester must be marked with the name of such judge of the Chancery Division as the Lord Chancellor from time to time directs (Order 5, r. 9; and see the Lord Chancellor's order of Jan. 21, 1897, nominating Mr. Justice Byrne to be such judge; W. N., 1897, 57). The respective district registrars attend and act as registrars in Court on the days on which the business from their respective registries is heard by the judge.

Under the rules of Court trial without a jury is the normal mode of trial. Where there was before the Judicature Acts a right to a trial by jury, such right still exists, otherwise not, but the Court may direct a trial by jury if it thinks fit.

Causes or matters assigned to the Chancery Division are tried by a judge without a jury, unless the Court or a judge otherwise order (Order 36, r. 3). In a case which previously to the Judicature Act, 1873, could have been tried in the Court of Chancery by a judge alone, without any consent of parties, a jury cannot be demanded as of right, but it is a matter for the discretion of the Court, and the burden of showing that the action ought to be tried with a jury lies on the applicant (see *The Temple Bar*, 1886, 14 P. D. 6; *Coote v. Ingram*, 1887, 35 Ch. D. 117; *Lynch v. Macdonald*, 1887, 37 Ch. D. 227). If the plaintiff commences his action in the Chancery Division, the onus is on him to show that the action should not be tried in the manner in which it would in the ordinary course be tried in that Division (see *A.-G. v. Vwyner*, 1890, 38 W. R. 194). The Court of Appeal will not interfere with the exercise of the judge's discretion as to the mode of trial, unless there is likely to be a failure of justice (see, for a case where the appeal was allowed, *Jenkins v. Bushby* [1891], 1 Ch. 484; where it was dismissed, *Mangan v. Metropolitan Electric Supply Co.* [1891], 2 Ch. 551).

A trial by jury cannot take place before a judge of the Chancery Division. Actions in that Division which are to be tried by jury must be set down in the general list of actions for trial in Middlesex, or at the place named in the statement of claim, and be tried by one of the judges of the Queen's Bench Division (*Warner v. Murdoch*, 1877, 4 Ch. D. 750).

The judges of the Chancery Division are attended by the Registrars of that Division. The Registrar in attendance takes a note of a judgment or order pronounced by the Court, from which minutes are afterwards prepared, and the judgment or order is finally drawn up, passed, and entered (see 1 *Dim. Ch. Pr.*, 6th ed., pp. 800 *et seq.*, and Order 62). Orders made in chambers are drawn up there, or by the Registrar from a note signed by the Master (see Order 55, rr. 74, 74A). Under the former practice the entry of a judgment or order was made by the entering clerk under the direction of the senior Registrar, and the original was delivered out to the solicitor having the carriage of it; but under the present practice the original document is filed under the direction of the senior Registrar, and a duplicate is supplied to the solicitor (Order 62, r. 2, substituted for the former rule in 1894). All petitions which require to be answered are answered in the name of the senior Registrar, and orders made on petitions,

of course (as to which, see *Dan. Ch. Pr.*, 6th ed., pp. 1544, 1564), are drawn up, passed, and entered by or under the direction of the Registrars of the Chancery Division.

The business transacted at chambers consists of interlocutory applications, proceedings originating in chambers, proceedings under judgments and orders, and proceedings on adjournments to chambers. Three Masters are attached to each of the four senior puisne judges of the Chancery Division, and they are assisted by subordinate clerks, under the general control of the judge. The judges of the Chancery Division to whom chambers are attached have power, subject to the rules of Court, to order what matters are to be heard and investigated by their Masters, either with or without their direction, during their progress. Where by the practice of the Division recognisances are required to be given, they are given to the two senior Masters for the time being of the judge to whom the cause or matter is assigned (Order 60, r. 4). As to business in chambers, see CHAMBERS, CHANCERY.

By the Supreme Court of Judicature (Funds, etc.) Act, 1883, one accounting department for the Supreme Court was established, and all securities and money at the commencement of the Act vested in the Paymaster-General in pursuance of the Chancery Funds Act, 1872, or at any time after such date transferred or paid into or deposited in Court to the credit of any cause, matter, or account in the Chancery Division, were to be vested in the Paymaster-General for and on behalf of the Supreme Court of Judicature, subject to the rules for the time being in force. These matters are now regulated by the Supreme Court Funds Rules, 1894, by which all other rules or general orders prescribing the mode of dealing with funds in Court, and containing any provisions relating to funds in Court inconsistent with these rules, are thereby revoked, and these rules substituted therefor as from Jan. 1, 1895. See also PAY OFFICE; PAYMASTER-GENERAL.

**Chancery Orders.**—The procedure of the Court of Chancery was from time to time regulated by general orders issued by direction of the Lord Chancellor, Lord Keeper, or Commissioners of the Great Seal for the time being. Mr. Sanders, in his *Orders of the High Court of Chancery*, begins the list with an Ordination Cancellaria in 12 Rich. II. (1388–9), amended in the time of Henry V.

Although a few general orders were issued before the succession of Lord Bacon to the Chancellorship in 1616,—for instance, Lord Ellesmere's ordinances in 1610, "for remedy of some disorders in proceedings in causes and other abuses of late crept into" the Court of Chancery,—it seems that the orders published by Lord Bacon in 1618 were the first attempt to reduce the practice of the Court into a more regular system. In 1635 Lord Coventry, with the advice of Sir Julius Caesar, M. R., issued some orders, which were afterwards embodied in Lord Clarendon's (Spence, *Equity*, vol. i. p. 402 n. (c)). In 1649 Whitelocke and Keble, the Parliamentary Commissioners of the Great Seal, with the advice of Lenthall, M. R., published selections from the orders of Lord Bacon and Lord Coventry, with additions, apparently with a view to a more formal edition (see the Appendix to Beames, *Orders in Chancery*, where these orders are printed); and in 1654 Cromwell drew up a code of ordinances intended to effect an extensive reform of the procedure of the Court of Chancery. In 1661 Lord Clarendon issued a fresh edition of the orders of the Parliamentary Commissioners,

and this code, with a few subsequent alterations and additions, including two orders issued by Lord Hardwicke in 1741 and 1747, continued to govern the procedure of the Court to the time of Lord Eldon. Lord Lyndhurst, in 1828, and his successor, Lord Brougham, issued orders designed, amongst other things, to expedite interlocutory proceedings in causes.

In 1833 an Act (3 & 4 Will. iv. c. 94) was passed for the regulation of the proceedings and practice of certain offices of the Court of Chancery, and during the subsequent twenty years many orders were issued (for a list of which, see *Dan. Ch. Pr.*, 2nd ed., p. xxv); and in pursuance of two other statutes relating to the Court (3 & 4 Vict. c. 94; and 4 & 5 Vict. c. 52), passed for the purpose of diminishing the delay and expense in suits, and giving extensive powers of making general orders, Lord Lyndhurst, in 1845, adopted and issued general orders and rules, which had been prepared by a committee formed by Lord Langdale, M. R., and which, having been laid before Parliament for the prescribed period, acquired the same force and effect as if they had been enacted (see per Sir G. J. Turner, L. J., in *Drummond v. Drummond*, 1866, L. R. 2 Ch. at pp. 44, 45). In 1850 Sir George Turner's Act (13 & 14 Vict. c. 35), to diminish the delay and expense of proceedings in the Court of Chancery, was passed, and Lord Cottenham issued a set of orders with a similar object, by which considerable improvements were effected. In the same year a commission was appointed to inquire into the jurisdiction and procedure of the Court, and its report was carried into effect by three statutes passed in 1852, and general orders issued in the same year, by the former of which the Masters in Chancery were abolished (15 & 16 Vict. c. 80), the practice and course of proceeding in the Court were amended, and power was given to the Lord Chancellor, with the advice and assistance of the other judges of the Court, to make general rules and orders for the purposes of the Act (15 & 16 Vict. c. 86), and relief was given to suitors (15 & 16 Vict. c. 87). In exercise of the statutory power above mentioned, a table of consolidated orders was prepared in 1859 by direction of Lord Chelmsford, and was issued in 1860 by Lord Campbell, with the advice and assistance of the Master of Rolls, the Lord Justices of the Court of Appeal in Chancery, and the Vice-Chancellors. By the preliminary order all the general orders of the Court of Chancery which had been at any time theretofore made were, with certain exceptions, abrogated, and the orders then promulgated were constituted the general orders of the Court, dating from Feb. 15, 1860, and having been laid before Parliament for the prescribed period without objection, became binding. The abrogation made as above mentioned did not extend to any rules put forth by the authority of the judges of the Court of Chancery not purporting to be general orders, but purporting to be mere regulations (see Morgan, *Chancery Acts and Orders*, 4th ed., Appendix, pp. i-lxxxvii), and the established practice which originated in, or was sanctioned by, any of the abrogated orders and then existing, was not affected except so far as inconsistent with the consolidated orders (for a table of the abrogated orders, and of the orders and regulations into which they were incorporated, see Morgan, pp. xvii; xxv). The new orders contained some six hundred rules, and were the first complete statement of the practice of the Court as settled by express orders. A large portion of the rules of the Supreme Court which came into operation at the commencement of the Judicature Act, 1875, and for which the rules of 1883 were substituted, is taken from the consolidated orders of 1860 (see table of corresponding rules in the *Annual Practice*, vol. ii.). Additional Chancery orders were subsequently issued,

particularly, one in 1861 dealing with the mode of taking evidence. Ultimately, by the rules of the Supreme Court, 1883, the consolidated orders of 1860, and subsequent Chancery orders, together with other rules and regulations, were annulled, and the rules of 1883 were directed to stand in lieu thereof (see R. S. C., App. O.; and Order 65, r. 27 (37), and Order 72, rr. 1 and 2).

[Kerly, *History of Equity*; Beames, *Orders in Chancery* (commencing with Lord Bacon's orders, and with a table of orders at pp. 509-512); Beavan, *Ordines Cancellariæ* (a selection of general orders of the Court of Chancery from 1814 to the end of 1845); Swift, *Orders of the High Court of Chancery* (from 1828 to Trin. term, 1845); Sanders, *Orders of the High Court of Chancery* (from the earliest period to 1845); Morgan, *Chancery Acts and Orders*, 4th ed.]

**Change of Course.**—See DEVIATION.

**Change of Parties.**—See PARTIES.

**Change of Solicitor.**—See SOLICITOR.

**Change of Venue.**—See VENUE.

**Channel.**—See PILOTAGE.

**Channel Islands.**—A group of islands not far from the coast of Normandy; they are included in the dominions of the Crown, and form part of the British islands, as defined by the Interpretation Act, 1889. Down to the year 1205, the islands belonged to the Duchy of Normandy; a warden or bailiff was appointed to act as the local representative of the Duke. The customs of Normandy, as set forth in the *Ancienne Coutume* and the *Grand Coutumier*, were the bases of the local law. See *Falle v. Godfray*, 1889, 14 App. Cas. 70, and authorities there cited. It appears that by a document known as the Constitutions of King John, issued soon after the separation of Normandy from the English Crown, provision was made for the appointment of Coronatores Jurati to take part in the administration of justice. From an early period Guernsey, with its dependencies, has been separated, for most purposes, from Jersey. Since the reign of Henry VII., separate governors were appointed; at present the practice is to appoint lieutenant-governors. The British customs tariff does not apply to the islands, but they are subject to the special regulations imposed by the Customs Acts. The Army Act applies to the troops maintained in the islands; the Extradition Act and the Fugitive Offenders Act are also locally in force. The 11 & 12 Vict. c. 42 makes provision for backing English warrants; the 14 & 15 Vict. c. 55 specifies the local officers who are authorised in that behalf.

Jersey, the largest of the islands, has a constitution of its own. The lieutenant-governor is in military command; but the bailiff, also appointed by the Crown, takes precedence in the Assembly of the States. The Royal Court consists of the bailiff and twelve jurats, who are elected for life by



the ratepayers. There is an appeal from the bailiff, sitting with two or three jurats as a Court of first instance (the *nombre inférieur*), to the bailiff and seven jurats (the *nombre supérieur*). The final appeal is to the Queen in Council, subject to the Orders in Council of 13th May 1572 and 19th May 1671; see also Clark, *Colonial Law*, p. 700. In making ordinances, the bailiff and jurats summon to their assistance the States of the island, i.e. the rector and constable of each parish, and fourteen elected deputies. Acts of Parliament and Orders in Council which apply to the island are registered in the Royal Court; the Court claims the right to suspend registration, at least in the case of Orders in Council. On the part of the Crown it is asserted that a peremptory order to register must be obeyed, or, in other words, that the Queen in Council may legislate for the island without consulting the States. At the same time, the Crown has at various times consented to withdraw Orders to which the States had taken objection. See *The States of Jersey*, 1842, 9 Moo. P. C. 185; the argument in the matter of a Prison Board in 1894 is not reported. It will be observed that these cases were heard, not by the Judicial Committee, but by a committee for the affairs of Jersey and Guernsey. The laws of Jersey were codified in 1771; for the subsequent Acts of the States, see the official *Recueil des Lois*; see also Le Geyt, *Lois, etc., de Jersey*, and the Histories of Falle and Le Quesne.

In Guernsey the lieutenant-governor represents the Crown, as in Jersey. The Royal Court is composed of the bailiff and twelve jurats; appeals to the Queen in Council are regulated by the Order in Council of 13th May 1823. The States of Election include the parish rectors, twenty constables, and one hundred and eighty *douzeniers*. The States of Deliberation are a smaller body, which possess a limited power of legislation and taxation. For the peculiarities of the local law, see Berry's *History of Guernsey*. For further information in regard to the constitutions of Jersey and Guernsey, see Anson on the *Constitution*, ii. 257.

Alderney has a separate Court and States of its own, but there is an appeal to the Royal Court of Guernsey, and the States of Guernsey may legislate for Alderney, subject to disallowance by the Queen in Council. Sark has a Court which exercises a limited criminal jurisdiction. The tiny island of Herm once attempted to assert its independence of Guernsey (1 Moo. P. C. 308), but the attempt was not successful. For conditions of appeal, see PRIVY COUNCIL.

**Chapel.**—1. A place of religious worship of the Church of England attached to a palace, college, or school, other than a cathedral and a parish church. This is its proper legal sense (see *Caiiger v. Islington Vestry*, 1881, 50 L. J. M. C. 59). As to offences with respect to such a place, see BRAWLING; CHURCH OF ENGLAND; SACRILEGE.

2. A place of worship of any Christian religious body other than the Church of England. This was its popular sense, but the statutory distinction between church and chapel is fading, and in 23 & 24 Vict. c. 32, the words "chapel of any religious denomination" are used. As to offences with respect to such chapels, see BRAWLING; NONCONFORMIST; RELIGIOUS WORSHIP.

• **Chapel of Ease.**—See CHURCH OF ENGLAND; RELIGIOUS WORSHIP.

**Chaplain.**—A clergyman of the Church of England who conducts religious service in a chapel (*q.v.*).

**Royal Chaplains.**—There are thirty-six chaplains in ordinary to the Queen, who perform religious service in rotation at St. James'.

**Army and Navy Chaplains.**—Under the Army Chaplains Act, 1868, a Secretary of State may appoint a clergyman in holy orders to perform religious service for the army in a particular district. Chaplains are to be treated with respect, and are to be saluted by soldiers (Queen's Army Regulations, 1895, s. 7, paragraphs 307 *et seq.*). Naval chaplains when appointed must be ordained priests of the Anglican Communion, under thirty-five years of age, and unbeneficed (Queen's Navy Regulations, 1879, s. 240).

**Cemetery Chaplain.**—Under the Cemeteries Clauses Act, 1847 (which only applies if incorporated in a cemetery company's private Act), it is provided that a cemetery chaplain shall be appointed and paid by the company to officiate in the consecrated part of the cemetery. The chaplain, who must be licensed by, and who is under the jurisdiction of, the bishop of the diocese, performs the burial service at all burials in the consecrated ground, and registers the same.

**Lunatic Asylum Chaplain.**—The visiting committee of every lunatic asylum must appoint a chaplain, who must be in priest's orders, and licensed by the bishop of the diocese. His duty consists in performing divine service on Sundays, Christmas Day, Good Friday, and on such other days as the visiting committee appoint. A superannuation allowance, not exceeding two-thirds of his salary, may be granted to him on being incapacitated by confirmed illness, or age, or infirmity, or if he has served not less than fifteen years, and is not less than fifty years of age (Lunacy Act, 1890, ss. 276–280; and see Wood Renton on *Lunacy*, pp. 617–631).

**Prison Chaplain.**—Prison chaplains, who must be priests of the Church of England, are appointed by the Home Secretary. Notice of any appointment has to be given to the bishop of the diocese, and his licence obtained. A prison chaplain is a "prison officer," and may be granted a superannuation allowance not exceeding two-thirds of his salary, if incapacitated by illness, or, if over sixty, he retires after service for a period not under twenty years.

**Workhouse Chaplain.**—The Local Government Board, under the Poor Law Acts, may direct overseers and guardians to appoint paid "officers," which term includes a chaplain. Such chaplains are removeable by the Local Government Board. They cannot be interfered with by the incumbent of the parish in which the workhouse is situate (*Molynceux v. Bagshaw*, 1863, 11 W. R. 687). A graduated scale of superannuation allowance is provided by sec. 3 of the Poor Law Officers' Superannuation Act, 1896. See POOR LAW.

[See Phillimore, *Ecclesiastical Law*, 2nd ed., vol. i. pp. 452 *et seq.*]

**Chapter.**—See DEAN AND CHAPTER.

**Character, Evidence as to.**—1. Every witness may be asked questions in cross-examination, with the object of showing him to be of bad character. The utmost latitude is allowed, restrained usually only by the discretion and character of counsel and his client's instructions. In the High Court a judge can interfere with this latitude under the R. S. C., 1883, Order 36, r. 38, where the questions are vexatious and irrelevant.

But no evidence may be called to contradict his answers to such questions unless they relate to a matter relevant to the issues being tried. (*R. v. Clarke*, 1817, 2 Stark. N. P. 241).

And the witness cannot be compelled to answer questions tending to show that he has committed a criminal offence for which he has not been tried (14 & 15 Vict. c. 99, s. 3), though he may be questioned as to previous convictions; and if he denies them, the previous convictions can be proved against him either in a civil action (17 & 18 Vict. c. 125, s. 6) or in a criminal proceeding (28 & 29 Vict. c. 18, s. 6). The legality or justice of such questions in the case of a defendant who is examined on oath is now in controversy.

Until 1843, persons convicted of certain crimes and offences were disqualified as witnesses (6 & 7 Vict. c. 85).

And the character of a witness may not be impeached by the party calling him, unless he proves hostile and the Court allow his cross-examination either in a civil proceeding (17 & 18 Vict. c. 125, ss. 22-24) or in a criminal case (28 & 29 Vict. c. 18, ss. 3-5).

2. Witnesses to character may not be called for the prosecution in a criminal case; nor for the plaintiff in a civil case, unless the credit or reputation of the plaintiff is in issue, as in actions for defamation or malicious prosecution. In these cases evidence of the character of the plaintiff may be given for the defence in mitigation of damages, subject in the case of defamation to R. S. C., Order 36, r. 37.

3. A person charged with an offence is entitled to call witnesses to his good character, to raise a presumption of his innocence, *i.e.* that his character is such that it is impossible or most unlikely that he would have committed the offence. Such witnesses are only allowed to speak of the general reputation in which the accused is held, and not as to their own personal opinion of his character, nor as to any particular acts or facts unless evidence on them would *directly* tend to disprove the charge under investigation (*R. v. Renton*, 1864, 34 L. J. M. C. 57); but they are open to cross-examination as to particular facts (*R. v. Hodgkiss*, 1836, 7 Car. & P. 298) or as to the general grounds of their belief.

Where the accused cross-examines with a view to prove his good character, or calls witnesses to character, the prosecution may call evidence in rebuttal, and may give evidence of previous convictions which would otherwise be inadmissible (6 & 7 Will. IV. c. 111; 24 & 25 Vict. c. 96, s. 116; c. 99, s. 37; *R. v. Shrimpton*, 1851, 21 L. J. M. C. 37).

Witnesses to the character of a person accused of an indictable offence are not put under recognisances to appear at his trial, nor are their costs payable out of the local rate (30 & 31 Vict. c. 35, ss. 3, 5).

4. It is also permissible to call for the defence general, but not particular, evidence, to prove that the character of any witness for the prosecution is such that he ought not to be believed on his oath (*R. v. Watson*, 1817, 2 Stark. N. P. at pp. 152-154; *R. v. Brown*, 1866, L. R. 1 C. C. R. 70). Upon charges for rape or like offences, the defence may also call evidence that the woman alleged to have been ravished is a common prostitute, or that she is generally reputed to be unchaste, but not to contradict her denial that she had previously had connection with a man other than the accused (*R. v. Riley*, 1886, 18 Q. B. D. 481; *R. v. Holmes*, 1874, L. R. 1 C. C. R. 334).

**Character, False.**—1. No action will lie on a false representation or assurance as to the character of another made to enable him to get

credit, money, or goods, unless the statements are in writing, signed by the person sued (9 Geo. IV. c. 14, s. 6; and see **GUARANTEE**).

2. Under the False Characters Act, 1792, 32 Geo. III. c. 56, provision is made for the punishment of persons giving false characters to servants. A penalty not exceeding £20, recoverable summarily, is incurred by persons (a) who falsely personate the masters or employers of a servant, or their stewards or agents, or who orally or in writing wilfully give a false character to a person offering himself as a servant; (b) who wilfully make a false statement in writing (1) that a servant has been in their own or other's service, in a particular station, or for a particular period (s. 2); or (2) as to the date of discharge, or as to the previous service of a servant (s. 3).

(c) By servants who, when offering themselves for service, make false statements (1) as to where they have served, or produce false, forged, or counterfeit certificates of character, or who alter certificates of character (s. 4); (2) that they have not been in a particular service (s. 5).

Provision is made by sec. 8 for indemnifying offenders who, before prosecution, disclose their accomplices. An appeal against a conviction lies to Quarter Sessions, but it cannot be removed by *certiorari*, or other process, into the High Court (s. 10). The penalties are payable half to the informer, half to the poor of the parish where the offence is committed (s. 6). The procedure and evidence under this Act is now regulated by the Summary Jurisdiction Acts.

**Charge, Charges.**—The word "charge" is used in various senses, the original signification being a burden or load. Thus, it may mean an accusation, or a liability to pay money laid upon a person or estate. In heraldry any device "charged" or borne upon an escutcheon is called a charge (*Murray, Eng. Dict., sub verb.*).

A grand jury are instructed in the articles of their inquiry by a charge from the judge; and a petty jury are instructed, at the close of the case, by the charge or summing-up of the judge. The address of a bishop or archdeacon to the clergy at his visitation is called a charge.

*Charge and Discharge* was the old mode or form of taking an account before a Master in Chancery (see *Dan. Ch. Pr.*, 4th ed., p. 1139 n.).

*Charges on Benefices.*—Under 13 Eliz. c. 20, a benefice with cure of souls cannot be directly charged or incumbered. A mortgage of pew rents by the vicar of a district church is void under the statute (*Ex parte Arrowsmith, In re Leveson*, 1878, 8 Ch. D. 96). Compensation payable to a retiring incumbent under 23 & 24 Vict. c. 142, s. 9, is not within the Act, and can be validly mortgaged by him (*McBean v. Deane*, 1885, 30 Ch. D. 520).

*Charges as between Landlord and Tenant.*—For cases on the construction of covenants in leases to pay rates, taxes, charges, and assessments, and relating to drainage and sewerage expenses under the Public Health Acts, see *Rawlins v. Briggs*, 1878, 3 C. P. D. 368; *Hartley v. Hudson*, 1879, 4 C. P. D. 367; *Wilkinson v. Collyer*, 1884, 13 Q. B. D. 1; *Smith v. Robinson* [1893], 2 Q. B. 53; and, under the Nuisances Removal Act, 1855, 18 & 19 Vict. c. 121, s. 19, *Bird v. Elwes*, 1868, L. R. 3 Ex. 225.

*Costs, Charges, and Expenses.*—In actions between themselves and strangers to the trust, executors, administrators, and trustees suing in that character are in the same position as to costs as if suing in their own right. As between themselves and creditors, executors and administrators are entitled to their full costs, charges, and expenses in priority to the debts.

As between themselves and the *cestui-que trust*, trustees are ordinarily allowed their costs of suit as between solicitor and client, and also any other costs, charges, and expenses properly incurred by them in the execution of the trust. "Charges and expenses" of trustees are not strictly costs, and the words are used because they include items which are not costs (see Morgan and Wurtzburg, *Costs*, pp. 396 *et seq.*; 2 Seton, 5th ed., pp. 990 *et seq.*). In a foreclosure or redemption action, the mortgagee will be allowed, in addition to his costs in the action, all costs, charges, and expenses necessarily or properly incurred in ascertaining, asserting, or defending his rights under his mortgage (see 2 Seton, pp. 1616 *et seq.*). And see EXECUTORS AND ADMINISTRATORS; TRUSTEES; MORTGAGE; COSTS.

*Charges in Pleadings.*—Under the former system of pleading in the Court of Chancery, where the plaintiff was aware of a defence which might be made, and had matter to allege which might avoid it, he used to allege in the Bill of Complaint that the defendant pretended or set up the particular defence, and to charge the matter which might be used to avoid it. This device was also used for the purpose of obtaining discovery of the nature of the defendant's case, or to put in issue something which it was not for the interest of the plaintiff to admit. The part of the Bill in which such allegations and charges were contained was commonly called the charging-part of the Bill (see Mitford, *Pleadings*, 5th ed., p. 50). Under the present system, the pleader should allege only those facts which are presently material, and should not anticipate the defence (see per James, L. J., in *Hall v. Eve*, 1876, 4 Ch. D. at p. 345); and charges and statements, which would not have been improper under the former system, may now be struck out (*Watson v. Rodwell*, 1876, 3 Ch. D. 380).

*Charges on Land.*—Under the Land Charges Registration and Searches Act, 1888, 51 & 52 Vict. c. 51, a register of land charges is kept at the office of Land Registry, and a charge created after 1888 is void as against a purchaser for value in default of registration. The Act contains also provisions for the registration of charges existing at the commencement of the Act (s. 13), and for vacation of a land charge pursuant to an order of the High Court or any judge thereof (s. 14). In the Act "land" includes lands, messuages, tenements, and hereditaments, corporeal and incorporeal, of any tenure, and a "land charge" means a rent or annuity or principal money payable by instalments or otherwise, with or without interest, charged, otherwise than by deed, upon land under the provisions of any Act (including a local and personal Act) for securing to any person either the moneys spent by him or the costs, charges, and expenses incurred by him under such Act, or the moneys advanced by him for repaying the moneys spent, or the costs, charges, and expenses incurred by another person under the authority of an Act, and a charge under sec. 35 of the Land Drainage Act, 1861, or sec. 29 of the Agricultural Holdings (England) Act, 1883, or sec. 31 of that Act (see the Tenants' Compensation Act, 1890, s. 3); but does not include a rate or scot, or charges created *in invitum* under sec. 257 of the Public Health Act, 1875 (*R. v. Vicar-Registrar of Office of Land Registry*, 1889, 24 Q. B. D. 178). Charges on land arise under various Acts besides those above mentioned, *e.g.* the Improvement of Land Act, 1864 (see ss. 59–65); the Copyhold Act, 1894 (see ss. 27–31, 36–41); the Finance Act, 1894, for estate duty (see s. 9 (6)); the Finance Act, 1896, for redeemed land-tax (see s. 32); and see Elphinstone and Clark, *Searches*. See LAND REGISTRY; SEARCHES.

*Family Charges.*—Such charges on land created by, or under powers in,

the "settled ent," where not dealt with for securing money actually raised, are displaced by a sale, etc., and conveyance under the Settled Land Act, 1882 (see s. 20, and Settled Land Act, 1890, s. 4). See SETTLED LAND.

*Charges, Jurisdiction as to.*—The raising of portions, or other charges on land, and the sale and distribution of the proceeds of property subject to any lien or charge, are by the Judicature Act, 1873, s. 34, assigned to the Chancery Division of the High Court. See LIEN; PORTIONS; SALE.

*Charge of Costs on Settled Property.*—Under the Settled Land Act, 1882, ss. 46 (6) and 47, the Court has power to order costs to be paid out of property subject to the settlement. Under these sections, costs of and incidental to the exercise of the powers of the Act can be made a charge on settled land (*In re Smith's Settled Estates* [1891], 3 Ch. 65). See COSTS; SETTLED LAND.

*Charge of Costs on Property Recovered or Preserved.*—Under 23 & 24 Vict. c. 127, s. 28, the Court or a judge before whom a suit, matter, or proceeding has been heard may declare the solicitor engaged therein entitled to a charge upon the property recovered or preserved through his instrumentality, and thereupon the solicitor has a right to payment, out of the property, of his taxed costs, charges, and expenses. See COSTS; SOLICITORS' REMUNERATION.

*Charging Order on Stocks and Shares.*—See CHARGING ORDER.

*Equitable Charges.*—An equitable charge is an agreement, declaration, or direction whereby real or personal estate is expressly or constructively made ~~liable~~, otherwise than by way of mortgage, to the discharge of some pecuniary burden, or is declared to be subject to a lien for securing the same (*Fisher, Law of Mortgage*, 4th ed., p. 84. See EQUITABLE CHARGE.

*Charge of Debts and Legacies.*—By Lord St. Leonards' Act (22 & 23 Vict. c. 35) provision is made for raising by sale or mortgage debts or legacies charged by will on real estate. As to this Act, and as to what amounts to a charge of debts and legacies, see 2 Seton, 5th ed., 1203, 1297–1299, 1350, 1351.

*Rent Charge.*—An incorporeal hereditament arising on a grant of an annual sum of money payable out of lands in which the grantor has an estate. Remedies for recovery of rent charges and other annual sums charged on land are given by the Conveyancing and Law of Property Act, 1881, s. 44. See RENT CHARGE.

*Tithe Rent Charge.*—An annual sum of money payable by the owner of land in lieu of tithes under the statutes for the commutation of tithes, and charged on the land. Remedies for recovery of the rent charge are given by the Tithe Act, 1891. See TITHES.

**Charge Sheet.**—The form or sheet on which the officer in charge of a police station or lock-up enters the accusations or charges against persons brought there in custody, whether arrested with or without warrant. Where a charge is made which the officer thinks insufficient for arresting or detaining any person, he refuses to take the charge. The sheet is taken with the prisoners before a Court of summary jurisdiction on the earliest opportunity.

**Chargeability.**—See POOR LAW (*Settlement*).

**Chargés d'affaires.**—Chargés d'affaires are accredited to the ministers of foreign affairs of the court at which they reside. The title of *chargé d'affaires* is also given to one appointed during the absence of an ambassador or minister to act in his place. See DIPLOMATIC AGENTS.

**Charging Orders.**—*Under the Judgments Act, 1838.*—A charging order under this Act is a mode of proceeding by a judgment creditor to enforce payment out of property of the judgment debtor which cannot conveniently be reached by other modes of execution. It is not a protected execution or transaction within secs. 45 and 49 of the Bankruptcy Act, 1883 (*In re O'Shea's Settlement* [1895], 1 Ch. 325; *Wild v. Southwood* [1897], 1 Q. B. 317). An order charging stock or shares may be made by any Divisional Court and by any judge, and the proceedings for obtaining it are such as are directed, and the effect is such as is provided, by 1 & 2 Vict. c. 110, ss. 14, 15; and 3 & 4 Vict. c. 82, s. 1 (R. S. C., Order 46, r. 1). Under these statutes, if any person against whom judgment had been entered up in any of the Superior Courts had any Government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not) standing in his name in his own right, or in the name of any person in trust for him, or in the name of the Paymaster-General, or was interested in the interest, dividends, or annual produce thereof, a judge of one of the Superior Courts might, on the application of any judgment creditor, order that such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, or such of them, or such part thereof respectively as he thought fit, should be charged with the payment of the amount for which judgment had been so recovered and interest thereon; and such order entitled the judgment creditor to all such remedies as he would have been entitled to if the charge had been made in his favour by the judgment debtor; but no proceedings could be taken to have the benefit of the charge until after the expiration of six calendar months from the date of the order. The above provisions extended to the interest of a judgment debtor whether in possession, remainder, or reversion, and whether vested or contingent.

In order to prevent any person against whom judgment has been obtained from transferring, receiving, or disposing of any stocks, funds, annuities, or shares authorised to be charged for the benefit of the judgment creditor, the order will be made in the first instance *ex parte*, and without any notice to the judgment debtor, and is an order to show cause only; and such order, if any Government stock, funds, or annuities, or any stock or shares in any public company, standing in the name of the judgment debtor in his own right or in the name of any person in trust for him, are to be affected by such order, restrains the Bank of England or the public company from permitting a transfer thereof or of the interest, dividends, or annual produce thereof in the meantime, and until the order is made absolute or discharged.

If, after notice of the order to the person, or persons to be restrained thereby, or, in case of corporations, to any authorised agent of such corporation, and before the same order is discharged or made absolute, the corporation or person or persons permit any such transfer to be made, then and in such case the corporation or person so permitting such transfer will be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment. No disposition of the judgment debtor

**L** in the meantime will be valid as against the judgment creditor; and unless the judgment debtor, within a time to be mentioned in the order, shows sufficient cause to the contrary, the order will, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute; and the judge has, upon the application of the judgment debtor or any person interested, full power to discharge or vary the order, and to award such costs as he may think fit.

A charging order cannot be made under the above statutory provisions upon cash in Court to the credit of the judgment debtor, but such an order can be made by way of equitable execution, and in aid of the powers given by sec. 12 of 1 & 2 Vict. c. 110, of taking money, etc., under a *fi. fa.* (*Brereton v. Edwards*, 1888, 21 Q. B. D. 488).

A charging order cannot be made except in respect of an ascertained sum; it cannot be made for costs to be taxed (*Widgery v. Tepper*, 1877, 6 Ch. D. 364); but where the judgment is for an ascertained sum payable at a future day, an order may be made forthwith (*Bagnall v. Carlton*, 1877, 6 Ch. D. 130).

Where the judgment debtor is a trustee of stock or share in a public company standing in his name, they are not held by him "in his own right" within the statute, and a charging order cannot be made upon them (*Cooper v. Griffin* [1892], 1 Q. B. 740; *Howard v. Sadler* [1893], 1 Q. B. 1).

A charging order has no greater operation than an instrument of charge signed by the debtor, and cannot be obtained upon a judgment for a debt which was not due. Hence, an order in respect of a debt void by reason of the contractor's infancy (*In re Onslow's Trusts*, 1875, L. R. 20 Eq. 677), or upon accruing dividends of property settled to the separate use of a married woman without power of anticipation (*Stanley v. Stanley*, 1878, 7 Ch. D. 589), is inoperative. But the effect of the order does not depend upon the capacity of the debtor to give a valid charge, but upon the validity of the judgment, and it will be satisfied out of the estate of a deceased lunatic as against his personal representatives (*In re Leavesley* [1891], 2 Ch. 1), but during the lunatic's life the Court retains the power (see LUNACY) of applying the fund in Court for his maintenance without regard to the order (*In re Plenderleith* [1893], 3 Ch. 332).

Since the Judicature Acts, a judge of the Chancery Division can charge stock or shares belonging to the judgment debtor in aid of a judgment obtained in any Division, and a judge of the Queen's Bench Division can charge cash under the control of the Chancery Division (see *Hopewell v. Barnes*, 1876, 1 Ch. D. 630; *Brereton v. Edwards*, 1888, 21 Q. B. D. 488, 499).

If the action is proceeding in a district registry, the application for an order *nisi* is made to the district registrar (Order 35, r. 5), but he cannot make an order absolute (Order 35, r. 6; Order 54, r. 12 (1)).

The application for a charging order is usually made by summons (see *Dan. Ch. Forms*, p. 418), and should be supported by evidence of the title of the applicant to the debt, and of the debtor's title to the property to be charged (see *Dan. Ch. Pr.*, 6th ed., p. 939). Where the fund is in Court the Paymaster's certificate of the fund must be produced. The order *nisi*, when passed and entered, should be served on the debtor, his solicitor or agent, and notice of it given to the Bank of England or company whose stocks or shares are affected by it. If the debtor appears to show cause against the order, it may be discharged or made absolute; if he does not appear it will be made absolute on production of an affidavit of service. If made absolute, it operates from the date of the order *nisi* (*Haly v. Barry*, 1868, L. R. 3 Ch. 452; *Brereton v. Edwards*, 1888, 21 Q. B. D. 488).



Where it was shown that the judgment debtor was dead at the date of the order *nisi*, it was discharged (*Finney v. Hinde*, 1879, 4 Q. B. D. 102).

Where an order has become absolute, the statute gives no power to rescind it (*Drew v. Willis* [1891], 1 Q. B. 450).

Where an order has been obtained on a fund in Court, the Paymaster-General must take notice of it, and a stop order (see STOP ORDERS) is unnecessary (*Brereton v. Edwards*, 1888, 21 Q. B. D. 488, 496).

Before the expiration of the statutory period of six months, during which the judgment creditor cannot proceed to obtain the benefit of his charge (see 1 & 2 Vict. c. 110, s. 14), he may take proceedings to protect his interest, by obtaining a stop order on the dividends on the fund charged (*Watts v. Jeffereyes*, 1851, 3 Mac. & G. 372), but notice to the Paymaster-General appears now to be sufficient (*Brereton v. Edwards*, *ubi supra*). A separate action must be brought to enforce a charging order by sale of shares comprised in it (*Leggott v. Western*, 1884, 12 Q. B. D. 287). For forms of charging orders, see 1 Seton, 5th ed., pp. 423-425.

*Under the Partnership Act*, 1890.—Since this Act, 53 & 54 Vict. c. 39, a writ of execution cannot issue against any partnership property except on a judgment against the firm; but the High Court, or a judge thereof, or the Chancery Court of the county palatine of Lancaster, or a County Court, may, on the application by summons (see R. S. C., Order 46, rr. 1A, 1B) of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the judgment debt and interest. The section applies in the case of a cost-book company as if the company were a partnership within the Act (see s. 23). The remedies of the judgment creditor, in whose favour a charging order has been made, are in general only such as he would have had if the charge had been made by the partner (*Brown, Janson, & Co. v. Hutchinson & Co.* [1895], 2 Q. B. 126). The section applies to a foreign firm having a branch house of business in England (s. c. [1895], 1 Q. B. 737). A charging order under this section, being a proceeding *in invitum*, is not a "transaction" protected by sec. 49 of the Bankruptcy Act, 1883 (*Wild v. Southwood* [1897], 1 Q. B. 317). By Order in Council, June 28, 1892, the section was applied to the Mayor's Court of London (see *London Gazette*, July 1, 1892, p. 3789). See PARTNERSHIP.

*Under the Solicitors Act*, 1860.—Under this Act, 23 & 24 Vict. c. 127, s. 28, in every case in which a solicitor is employed in any proceeding in any Court, the Court or judge before whom the proceeding has been heard, or is depending, may declare such solicitor entitled to a charge upon the property recovered or preserved through his instrumentality for his taxed costs, charges, or expenses of or in reference to the proceeding (see 2 Seton, 5th ed., pp. 930-935). The judge of the High Court in Bankruptcy has power as a judge of the High Court, though not under his bankruptcy jurisdiction, to make charging orders under the Act (*In re Wood* [1897], 1 Q. B. 314). See COSTS; SOLICITOR.

## Charities.

### HISTORICAL INTRODUCTION.

#### *Mortmain and Early Charitable Gifts.*

The earliest form of charity consisted of gifts of land to religious houses. One effect of such a gift was that the Crown, and any intermediate lord of whom the land was held, lost the right to the military and other

services which were previously due from the tenant of the land. Hence the land was said to be in a dead hand, or, in Latin, *in mortuâ manu*. The English word "mortmain" was coined to describe this condition, and the conveyance of land in mortmain was called mortising the land.

It was soon found to be contrary to public policy that much land should be mortised; and, after several partial statutory restrictions, the Act 7 Edw. I. c. 2 was passed in 1279, forbidding land to be conveyed in mortmain under the penalty of forfeiture thereof to the lord of the fee, or to the Crown. Various evasions of this statute were then devised by the ecclesiastics, and further Acts were passed to defeat them, namely, 13 Edw. I. cc. 32 and 33; 18 Edw. III. stat. 3, c. 3; 15 Rich. II. c. 5.

These statutes imposed the penalty of forfeiture of the lands on all direct or indirect gifts of land to or for religious houses, and extended the law to guilds, fraternities, and municipal corporations. Such a gift, therefore, could then only be made with the consent of the Crown and all intermediate lords; but, in the course of centuries, the rights of intermediate lords fell in importance, and by the Act 7 & 8 Will. III. c. 37, a licence from the Crown was made sufficient to enable any corporation to hold any land.

The above-mentioned statutes have recently been formally repealed, but, in effect, re-enacted by the Mortmain and Charitable Uses Act, 1888, which defines the existing law upon the subject. We propose to call this Act shortly the Mortmain Act, 1888.

With respect to testamentary gifts, land was not devisable at common law, and, when the system of uses (*q.v.*) was introduced, a gift of the use of land to a corporation was brought within the Mortmain Acts by the above-mentioned statutes. Then, when land was first made devisable, a devise to a corporation was rendered void (Stat. 32 Hen. VIII. c. 1; 34 Hen. VIII. c. 4). Under the existing Wills Act, a devise to a corporation appears to be good, but it lets in the right of the Crown to seize the land.

A rule, however, was long ago laid down by the Court of Chancery, that a lawful trust should not fail for any defect in the trustee; and this rule was applied to devises of land to corporations upon lawful charitable trusts; so that such trusts were preserved, and the corporation was constituted trustee of them, and a decision was even given that the corporation in such a case took the legal estate in the land (*Benet Coll. Camb. v. Bishop of London*, Jan. 1778, 2 Black. W. 1182).

Another exception to the general law of gifts to corporations existed in the city of London, of which the customs were confirmed by Magna Charta. According to these customs, land within the city was devisable, and the citizens enjoyed the right of devising their lands in mortmain. Even after the first Mortmain Act, the City Courts held that the custom for the citizens to devise land in mortmain continued valid, and the Crown abstained from seizing lands so devised; and in 1327 Edward III. granted a charter to the city, expressly empowering its citizens to devise their lands within the city in mortmain, and this clause has been repeated in all succeeding charters. Many important charitable gifts have been made under this custom.

Another method of making charitable gifts was also invented in early times by means of the system of uses; and this method was not affected by the Statute of Uses (27 Hen. VIII. c. 10, A.D. 1535), except that it caused the word "trust" to be employed instead of "use"; and this is the commonest method of effecting charitable dispositions at the present day.

According to this system, property is vested in trustees, it may be by will, or conveyance, or transfer, with a direction added that the trustees

shall hold the property, to the use or upon trust, to apply the income yearly for some specified charitable purposes. The deed creating the charity ordinarily contains provisions for appointing new trustees of the charity from time to time; and there are now certain statutory enactments for facilitating this object, besides the general law as to the appointment of new trustees (13 & 14 Vict. c. 28; 53 & 54 Vict. c. 19). The trustees of any charity can also procure themselves to be incorporated by the Charity Commissioners, and the Crown has at all times possessed the power of incorporating any body of persons, and many charitable institutions have at all times been founded by means of charters from the Crown.

Many cases occurred of land, or rent charges issuing out of land, being disposed of for pious uses before the Reformation; and, when the change of religion came, many uses formerly deemed pious came to be regarded as superstitious—for instance, paying priests and others to say masses, or to pray for the soul of the donor, or to keep lamps burning. The Act 1 Edw. vi. c. 14 then vested in the Crown all property given for superstitious purposes prior to its date, 1547, and a later Act of 1559, 1 Eliz. c. 24, vested in the Crown all property so given after the date of the former Act. Property given for superstitious purposes since the last-mentioned date does not go to the Crown, but the superstitious use or trust is simply void, and the property passes accordingly (*In re Blundell's Trusts*, 1861, 30 Beav. 360).

*The Statute of Charitable Uses*, 1601, 43 Eliz. c. 4.

The Acts vesting in the Crown all property devoted to superstitious uses gave rise to many decisions, and called attention to the fact that it was very easy for the trustees of property affected with a charitable trust to appropriate the property to themselves. The above-mentioned Act of 1 Eliz. c. 24 had authorised the Crown to appoint Commissioners to redress such abuses in some cases, and this power was extended in 1596 by an Act, 39 Eliz. c. 6, and still further in 1601 by a later Act, 43 Eliz. c. 4.

The last-mentioned Act is usually called the Statute of Charitable Uses (Tudor, 2nd ed., p. 5; Shelford, p. 815), and plays an important part in the history of the law of charities, for three reasons: (1) many Commissions were issued under it, and reports were drawn up by the Commissioners, and these are now preserved in the Record Office, and form a valuable storehouse of information concerning ancient charities; (2) the statute was used by the law Courts as a ground for abolishing in favour of charitable gifts many rules of law requiring special forms of conveyance to be employed in certain cases; and (3) the list of charitable objects contained in it has been taken as a guide towards defining what objects were deemed charitable in English law.

The Act continued in force until the year 1746, but after that date only three Commissions were issued under it, the last being that of the Kirby Ravensworth Hospital, reported in 1808, 15 Ves. 305; and the Act was formally repealed by the Mortmain Act, 1888, but the list of charities contained in its preamble is still preserved (s. 13). This list is in effect as follows:—

1. The relief of aged, impotent, and poor people.
2. The maintenance of sick and maimed soldiers and mariners.
3. The maintenance of schools of learning, free schools, and scholars in universities.
4. The repairs of bridges, ports, havens, causeways, churches, sea banks, and highways.
5. The education and preferment of orphans.

6. The relief, stock, or maintenance of houses of correction.
7. Marriages of poor maids.
8. The supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed.
9. The relief or redemption of prisoners or captives.
10. The aid or ease of any poor inhabitants concerning payment of fifteens, setting-out of soldiers, and other taxes.

Returning to the point in history at which this Act was passed, we find no great change in the law until the Restoration of Charles II., at which epoch all military tenures were transformed into socage tenure, and all land became devisable (12 Car. II. c. 24). At the same time a method of calling charitable trustees to account was invented by means of suit in Chancery, called an information by the King's Attorney-General, against the defaulting trustees (*A.-G. v. Newman* (21 & 22 Car. II.), 1 Ch. Cas. 157; *R. v. Newman*, 1670, 1 Lev. 284). This mode of procedure gradually gained upon the procedure by Commissions under the statute of Elizabeth, and eventually superseded it, and has now in its turn been practically superseded by the institution of permanent Charity Commissioners. (See CHARITY COMMISSION.)

*The Georgian Mortmain Act, 1736, 9 Geo. II. c. 336.*

The full power of devising lands for charitable purposes, which was acquired at the Restoration, soon led to a multiplication of charitable institutions, and the evil came to be felt again of allowing much of the soil of the country to get into this class of ownership. To obviate the calamities thus dreaded, the Act 9 Geo. II. c. 36 was passed in the year 1736. This Act came to be generally known as the Mortmain Act (Williams on *Real Property*, Pt. 1, c. 3), although it differs in its purport from the older Acts to which that name was applied. The most convenient way of distinguishing the two appears to be to call this the Georgian Mortmain Act; but the framers of the Short Titles Act, 1896, have unfortunately given it the short title of The Charitable Uses Act, 1735. This short title involves an error of one year in the date, for it was passed in 1736, and bestows on it a name which was previously assigned by custom to the Act 43 Eliz. c. 4, which is an Act of a totally different nature.

As the Act 9 Geo. II. c. 36 remained in force until the year 1888, and was then only formally repealed with a re-enactment of its principal provisions, and as these are still in force with respect to conveyances *inter vivos* to charities, it will be necessary to give a full account of it.

The first section enacts in effect that no lands or stocks or other personal estate to be laid out in lands shall be conveyed or charged in trust for any charitable use, unless such be "gift made by deed indented, sealed, and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor (including the days of the execution and death), and be enrolled in His Majesty's High Court of Chancery within six calendar months next after the execution thereof, and unless such stocks be transferred in the public books usually kept for the transfer of stocks, six calendar months at least before the death of such donor or grantor (including the days of the transfer and death), and unless the same be made to take effect in possession for the charitable use intended immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him."

The second section provides that the requirement of twelve months' survival in the case of gifts of land, and six months in the case of gifts of stock, shall not apply to conveyances and transfers made for full value. But the other provisions apply even to purchases for full value made by charitable trustees and corporations.

The third section enacts that all conveyances of lands, or any estate or interest therein, or any charge affecting any lands, or any personal estate to be laid out in the purchase of the like, in trust for any charitable use made in any other form after the 24th of June 1736, should be void.

The fourth section excepted out of the Act gifts to the two universities or any of the colleges or houses of learning within them, and gifts for the better support and maintenance of the scholars of the colleges of Eton, Winchester, and Westminster.

The fifth section restricted the number of advowsons which might be held by any college; and the sixth provided that the Act should not extend to Scotland.

It will be seen that one effect of this Act was to prevent any charitable gift by will of any land or charges upon land or personal estate from being laid out in land.

The law remained in this state until the 5th of August 1891, on which date the Mortmain and Charitable Uses Act, 1891 (hereinafter called the Mortmain Act, 1891), received the royal assent, and in the case of all persons dying after that date free power of making charitable gifts by will was given, with merely some provisions added, directing a sale of any lands given for charitable purposes.

The prohibitions of the Act 9 Geo. II. c. 36 remained in full force as to testamentary gifts from the date of its passing until August 5, 1891, and gave rise to a division of personal estate into pure personalty, which might be given by will for charitable purposes, and impure personalty, which could not be so given. The latter included leaseholds for years, money secured upon land by mortgage or otherwise, and a share in the proceeds of land held on trust for sale. In many cases very fine distinctions were drawn between items of pure and impure personalty; and particularly in the case of corporation bonds the Court scrutinised the Acts of Parliament under which they were issued, and the bonds and the property charged by them, in order to see whether the bondholders could by any possibility get hold of any land. All these refinements are now obviated by the Act of 1891.

Another prohibition imposed by the Act 9 Geo. II. c. 36 invalidated dispositions by will directing money to be laid out in land for a charitable purpose. This prohibition extended to all personal estate, pure as well as impure, and the word to "mortise" was again used to denote the operation of thus bringing land under a charitable trust. The prohibition was held to invalidate any gift for a charitable purpose, which could not be effected without the acquisition of land. The law on the subject is now completely altered by the Act of 1891, and such gifts are good, but so that no charity thus created can acquire more land than is required for its site.

#### *Exemptions from the Acts of 1736 and 1888.*

It will be seen that the Universities of Oxford and Cambridge, and the colleges and houses of learning in them, and the scholars of Eton, Winchester, and Westminster, were exempted from the Act 9 Geo. II. c. 36. This exemption is preserved by the Mortmain Act, 1888, and the Universities of London and Durham, and Victoria University, are thereby placed in the same

position as Oxford and Cambridge; and Keble College is added to the list, being a college with a special constitution, as to which a doubt might have arisen whether it was or was not a college within the University of Oxford. A very serious doubt may certainly be entertained as to whether any colleges or houses of learning founded after August 13, 1888, the date of the Act of that year, have the benefit of this exemption.

Other charitable institutions have from time to time been exempted from the Act 9 Geo. II. c. 36, and here we may remark that a clause in a Crown Charter purporting to exempt from this Act is insufficient to accomplish that object; inasmuch as the Crown has no power to dispense with Acts of Parliament (1 W. & M. Stat. 2, c. 2, ss. 1, 2). If A. makes a free gift of land to a charitable institution, and dies within twelve months, the gift becomes void, and A.'s representative may recover the land. The Crown has no power to defeat this right. The effect of the Act 9 Geo. II. c. 36 is thus different from the effect of the old Mortmain Acts, which inflict a forfeiture of the land as a penalty for alienation to a corporation. The parties to whom the land was forfeitable, namely, the Crown and any intermediate lords, could always waive the forfeiture and confirm the gift; and the Act 7 & 8 Will. III. 3, c. 37, enabled the Crown alone to do this. There is no similar provision respecting the Act 9 Geo. II. c. 36. Only an Act of Parliament can exempt from it.

A certain number of charities have, however, procured Acts of Parliament granting them exemption from the Act 9 Geo. II. c. 36, and all such exemptions are preserved by the Mortmain Act, 1888, s. 8. The following is a list of such charities, so far as we are able to discover:—

19 Geo. III. c. 23, Bath Hospital; up to a limit of £1000 per annum.

43 Geo. III. c. 107, Queen Anne's Bounty; not applicable to gifts by married women apart from their husbands.

51 Geo. III. c. 105, the Royal Naval Asylum.

5 Geo. IV. c. 39, the British Museum.

10 Geo. IV. c. 25, Greenwich Hospital.

3 & 4 Will. IV. c. 9, the Seamen's Hospital Society; up to a limit of £12,000 per annum.

4 Will. IV. c. 38, St. George's Hospital; up to a limit of £20,000 per annum.

6 & 7 Will. IV. c. xx., Westminster Hospital; up to a limit of £20,000 per annum.

32 & 33 Vict. c. xxiii., University College, London; up to a limit of £10,000 per annum.

The Act 45 & 46 Vict. c. 73, called the Ancient Monuments Protection Act, 1882, enables any person entitled to any of the ancient monuments specified in the schedule to the Act to give the same by deed or will to the Commissioners of Works. See ANCIENT MONUMENTS.

There are also certain Acts of Parliament excepting certain classes of charitable gifts from the Act 9 Geo. II. c. 36, and all these exceptions are preserved by sec. 8 of the Act of 1888. These are as follows:—

The Act 42 Geo. III. c. 116 (26 June 1802) allows gifts of money for redeeming land tax on lands settled to charitable uses; and gifts of rent charges representing redeemed land tax for the augmentation of livings.

The Act 43 Geo. III. c. 108 (27 July 1803) allows gifts not exceeding five acres of land and £500 of money for repairing or providing any church or minister's house in connection with the Church of England, the gift being made by deed enrolled as a bargain and sale (*q.v.*) or by will, and the same being executed three calendar months before the donor's death; with a

proviso that the Act should not enable married women to make such gifts without their husband's concurrence. (See ACKNOWLEDGMENT OF DEEDS.)

The Act 6 & 7 Vict. c. 37 (28 July 1843) enables every person by will to give to the Ecclesiastical Commissioners his lands, goods, and chattels for the endowment of new ecclesiastical districts or providing new churches.

The Act 34 Vict. c. 13 has been repealed by the Mortmain Act, 1888, but its provisions are reproduced in that Act (s. 6) with a slight addition. The result is that any quantity of land may be given by deed, for the purposes of a public park, schoolhouse for an elementary school, or a public museum; while, by will, any quantity not exceeding twenty acres may be given for a park, two acres for a museum, and one acre for a schoolhouse; but the deed or will must be executed twelve months before the death of the donor, and must be enrolled in the books of the Charity Commissioners within six months, reckoned in the case of a deed from its execution, and in the case of a will from the testator's death. A devise in a will which is a reproduction of a devise in an earlier will is valid, if the earlier will was made twelve months before the testator's death.

Another Act repealed by and reproduced in the Mortmain Act, 1888, is the Act 31 & 32 Vict. c. 44. The result is that a conveyance for full value to "trustees on behalf of any society or body of persons associated together for religious purposes, or for the promotion of education, art, literature, science, or other like purposes, of land not exceeding two acres for the erection thereon of a building for such purposes or any of them," or whereon such a building has been erected, is exempted from the provisions of the Act 9 Geo. II. c. 36, and the corresponding provisions of the Act of 1888.

Other Acts granting limited exemptions are as follows:—

4 & 5 Vict. c. 38; 7 & 8 Vict. c. 37; 12 & 13 Vict. c. 49; 14 & 15 Vict. c. 24; 15 & 16 Vict. c. 49, as to sites for schools.

17 & 18 Vict. c. 112, as to literary and scientific institutions.

22 Vict. c. 27, as to recreation grounds.

36 & 37 Vict. c. 50, sites for places of worship and burial.

Subsequent to the Mortmain Act, 1888, the Working Classes Dwellings Act, 1890, 53 & 54 Vict. c. 16, was passed, enacting that the prohibitions of the Mortmain Act of 1888 should not apply to any assurance by deed or will of land or of personal estate to be laid out, in land for the purpose of providing dwellings for the working classes in any populous place as there defined; with a proviso that the quantity of land, which might be assured by will, should not exceed five acres; and that for England and Wales every deed should within six months after execution, and every will should within six months after probate, be enrolled in the books of the Charity Commissioners. This Act appears to have been overlooked by the framers of the Mortmain and Charitable Uses Act, 1891.

The Technical and Industrial Institutions Act, 1892, 55 & 56 Vict. c. 29, exempts conveyances and devises for such institutions from all restrictions, including the direction for sale contained in the Act of 1891.

#### *The Mortmain Act, 1891,*

In the state of law above shown, the Mortmain and Charitable Uses Act, 1891, was passed, being an Act not extending to Scotland or Ireland, in which countries the Act 9 Geo. II. c. 36 was not in force.

The 3rd section of this Act enacts that "Land in the Mortmain and Charitable Uses Act, 1888, and in this Act, shall include tenements and hereditaments, corporeal or incorporeal, of any tenure, but not money

secured on land; or other personal estate arising from or connected with land."

This alone abolishes the old distinction of pure and impure personalty, and enables impure personalty, other than leasehold hereditaments, to be settled by deed or bequeathed by will for charitable purposes.

The 5th section runs as follows:—Land may be assured by will to or for the benefit of any charitable use, but, except as hereinafter provided, such land shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the testator, or such extended period as may be determined by the High Court, or any judge thereof sitting at chambers, or by the Charity Commissioners.

This section leaves the old law to apply to conveyances of land *inter vivos*, so that, rather strangely, such gifts are subject to more stringent rules than gifts by will. If a person by deed enrolled conveys land for a charitable purpose to commence at once, the gift is avoided by his death within a year; while a devise by will is good, however soon the testator dies.

The 6th section of the Act vests in the official trustee of charity lands all land devised for charitable purposes, and not sold within the prescribed time, and directs the Charity Commissioners to cause the same to be sold.

The 7th section enacts that personal estate given by will for charitable purposes, with a direction to lay out the same in land, shall be held for the charitable purposes without the direction.

The 8th section allows a site for a charitable institution to be retained or acquired with the sanction of the Charity Commissioners or the High Court.

The 10th section preserves the exceptions mentioned in the Mortmain Act, 1888, but unfortunately omits to mention the Working Classes Dwellings Act, 1890. (See ARTISANS.)

#### *Relaxations of the Georgian Mortmain Act, 1736.*

We have already mentioned that the provisions of the Act 9 Geo. II. c. 36 are reproduced in the Mortmain Act, 1888, and still apply to conveyances, *inter vivos*, of land or personal estate directed to be laid out in land for charitable purposes.

One of the provisions of the Act 9 Geo. II. c. 36, so reproduced, is, that the assurance must be without any power of revocation, reservation, condition, or provision for the benefit of the assurer or any person claiming under him. This provision had been relaxed from time to time (24 Vict. c. 9; 27 Vict. c. 13, s. 4), and the relaxations are reproduced by two clauses (§. 4, subs. (4) and (5)) as follows:—

"(4) Provided that the assurance, or any instrument forming part of the same transaction, may contain all or any of the following provisions, so, however, that they reserve the same benefits to persons claiming under the assurer as to the assurer himself, namely—

- (i.) The grant or reservation of a peppercorn or other nominal rent;
- (ii.) The grant or reservation of mines or minerals;
- (iii.) The grant or reservation of any easement;
- (iv.) Covenants or provisions as to the erection, repair, position, or description of buildings, the formation or repair of streets or roads, drainage or nuisances, and covenants or provisions of the like nature for the use and enjoyment as well of the land comprised in the assurance, as of any other adjacent or neighbouring land;



- (v.) A right of entry on non-payment of any such rent, or on breach of any such covenant or provision ;  
 (vi.) Any stipulations of the like nature for the benefit of the assurer or of any person claiming under him.

"(5) If the assurance is made in good faith on a sale for full and valuable consideration, that consideration may consist wholly or partly of a rent, rent charge, or other annual payment reserved or made payable to the vendor, or any other person, with or without a right of re-entry for non-payment thereof."

When land is purchased as a site for a charitable institution out of money contributed for that purpose, it is generally most convenient to take a conveyance from the vendor to the trustees of the intended institution by one deed, drawn as an ordinary purchase deed by persons buying for their own benefit; and to procure the trustees to execute a second deed declaring the trusts upon which the land is to be held by them. It had been provided that, in such a case, enrolment of the second deed should be sufficient, and this provision is reproduced in the Mortmain Act, 1888, s. 4, subs. (9).

The Act of 1888, s. 5, also reproduces some provisions of earlier Acts, remedying in certain cases an omission to enrol a deed within the proper time, and slightly extending those provisions.

Since the commencement of the Judicature Act, 1875, the Central Office of the Supreme Court of Judicature has taken the place of the Chancery Enrolment Office, as the place for enrolment.

It will be seen that the Mortmain Act, 1888, consolidated the existing law upon the subject of mortmain and charitable dispositions with a few trifling amendments, and that Act, with the important alteration introduced by the Act of 1891, constitutes the existing statutory law upon the subject.

#### DEFINITION AND INCIDENTS OF CHARITABLE TRUSTS.

Trusts for religion, learning, benefit of animals, benevolent objects, churches, and parishes.

Charitable trusts constitute an exception to the law of perpetuities. A perpetual trust for a charitable purpose is lawful; and conversely all those objects for which perpetual trusts have been constituted or allowed by law are charitable trusts. In deciding whether any particular object is or is not charitable, the Courts have been guided by the lists of charities in the Statute 43 Eliz. c. 4; and they have also been guided by a consideration of the question, Is it for the public benefit that a permanent trust for such a purpose should be allowed?

The following have been held to be lawful charities: all trusts for the support or promotion of any lawful form of religion. See RELIGION. Formerly penalties were attached to the observance of all forms of religion, except those of the Established Church; but in 1688 the first Toleration Act was passed in favour of Trinitarian Protestant Nonconformists, and this was afterwards extended to Roman Catholics, Unitarians, and Jews; and the old statutes imposing the penalties have also been repealed, so that trusts for the promotion of all forms of religion appear to be lawful in England now.

Gifts for the promotion of all forms of learning are deemed charitable as—

For the British Museum (*Trustees of British Museum v. White*, 1826, 2 Si. & Stu. 594; 25 R. R. 270).

For prizes for essays on statistics, politics, or government, criticism, and moral philosophy (*Thompson v. Thompson*, 1844, 1 Coll. 381).

For the Royal Society, the Royal Geographical Society, the Royal Humane Society, the Marylebone School for Girls, and the Albert Orphan Asylum (*Beaumont v. Oliveira*, 1868, L. R. 6 Eq. 534, and L. R. 4 Ch. 309; see also *Royal Society of London v. Thompson*, 1881, 17 Ch. D. 407).

To endow an existing professorship of mineralogy and geology, and to found a new professorship of archaeology at University College, London (*Yates v. University College, London*, 1873, L. R. 8 Ch. 454, and 1875, L. R. 7 H. L. 438).

To found travelling fellowships at a College of Oxford (*A.-G. v. Green*, 1789, 2 Bro. C. C. 492).

To found a lectureship in polemical or casuistical divinity (*A.-G. v. Margaret and Regius Professors in Cambridge*, 1682, 1 Vern. 54).

To educate boys in the study of mathematics at Christchurch Hospital (*A.-G. v. Hartley*, 1793, 4 Bro. C. C. 412).

To add books to the library of Trinity College, Oxford, and repair and adorn the library (*A.-G. v. Marchant*, 1866, L. R. 3 Eq. 424).

To found a professorship of economic fish culture (*Buckland v. Bennett, Law Journal Notes*, 1887, p. 7).

Gifts to benefit man through the medium of benefiting animals and improving the cultivation of vegetables are good (*Townley v. Bedwell*, 1801, 6 Ves. 194; 9 R. R. 352; *University of London v. Yarrow*, 1857, 1 De G. & J. 72, affirming 23 Beav. 159).

The cases on trusts for benefiting animals are not easily reducible to any principle (*Mitford v. Reynolds*, 1842, 1 Ph. Ch. 185; 1848, 16 Sim. 105; *In re Dean, Cooper Dean & Stevens*, 1889, 41 Ch. D. 552; *A.-G. v. Whorwood*, 1750, 1 Ves. Sen. 536; *Tatham v. Drummond*, 1864, 34 L. J. Ch. 1; *Marsh v. Means*, 1857, 3 Jur. N. S. 790; *Obert v. Barrow*, 1887, 35 Ch. D. 472; *In re Foveaux's Estate, Cross v. London Anti-Vivisection Society* [1895], 2 Ch. 501).

Gifts for the following objects have also been held to be charitable:—

To establish a lifeboat (*Johnston v. Swan*, 1818, 3 Mad. 457; 18 R. R. 270).

To the Royal National Lifeboat Institution (*Lewis v. Bortefeur*, W. N. 1878, p. 21; 1879, p. 11). Ditto, with a condition as to two tubular lifeboats (*In re Richardson, Shaldham v. R. N. Lifeboat Institution*, 1887, 35 W. R. 710).

To assist emigrants (*Barclay v. Maskelyne*, 1858, 4 Jur. N. S. 1294).

For prize shooting at moving objects (*In re Stephens, Giles v. Stephens*, 1892, 36 L. Jo. 713); for an officer of a rifle corps (*In re Lord Stratheden and Campbell*, [1894], 3 Ch. 265). On the other hand, a prize for yachting is not a charity (*In re Nottage, Jones v. Palmer* [1895], 2 Ch. 649); and a society for practising singing has been held to be not a charity but a private society for the benefit of its own members (*In re Allsop's Estate, Gell v. Carver*, W. N. 1884, p. 196); and the same has been said of a society for accomplishing an object by prayer (*In re Jay, Purday v. Johnson, Times*, Dec. 8, 1888).

The following objects have also been held to be charitable in the case of the Established Church:—To keep up an organ and pay an organist (*A.-G. v. Oakaver*, 1736, cit. 1 Ves. Sen. 536), to pay for a sermon on Ascension Day, to keep chimes in repair, to pay singers on Ascension Day (*Turner v. Ogden*, 1787, 1 Cox, 316), to build an organ gallery and put up an organ (*Adnam v. Cole*, 1843, 6 Beav. 353), for the choir fund and to put up a new clock.

(*Watson v. Blakeney*, 1887, 35 W. R. 730), the erection of a steeple and repairing bells, and salaries of a sexton and organ tuner (*In re Palatine Estate Charity*, 1888, 39 Ch. D. 60), the repair of parsonage houses (*A.-G. v. Bishop of Chester*, 1785, 1 Bro. C. C. 444), to build a new parsonage house (*Brodie v. Duke of Chandos*, 1773, 1 Bro. C. C. 444 n.), to keep burial grounds in repair (*Vaughan v. Thomas*, 1886, 33 Ch. D. 187).

Similar gifts for places of worship of other denominations would doubtless come under the same principle if the buildings were legally devoted to the purpose of public worship. But perpetual gifts for the support of private chapels are void for remoteness (*Hoare v. Hoare*, 1886, 56 L. T. N. S. 147). Furthermore, in the case of burial grounds, the reasons for holding that a public purpose is served by repairing those attached to churches of the National Church do not apply to those attached to other places of worship (*Vaughan v. Thomas*, 1886, 33 Ch. D. 187).

Gifts to a church or parish *eo nomine* are good charitable gifts, and are usually payable to the churchwardens (*A.-G. v. Ruper*, 1722, 2 P. Wms. 125; *West v. Knight*, 1669, 1 Ca. in Ch. 134). Conversely, property found in the hands of churchwardens is presumed to be fixed with some charitable trust.

Gifts in aid of the poor-rate (*Doc v. Howells*, 1831, 2 Barn. & Ald. 744), for repairing a bridge (*In re Hall's Charity*, 1851, 14 Beav. 115), for police and other rates, defraying the expenses of registering voters, and the ordinary expenses of a parish (*A.-G. v. Blizard*, 1855, 21 Beav. 223; *A.-G. v. Webster*, 1875, L. R. 20 Eq. 483), are charitable gifts.

#### GIFTS FOR PRIVATE FANCIES, RELIGIOUS ORDERS, PRIVATE SOCIETIES, MINISTERS, POOR PERSONS, PUBLICATIONS, AMENDMENT OF LAW.

Dispositions which are not for the benefit of the public or any living persons are void altogether.

A trust to keep a house shut up for twenty years is void, and the house is undisposed of for that term (*Brown v. Burdett*, 1882, 21 Ch. D. 667).

A trust to feed sparrows is said to have been held void (*A.-G. v. Whorwood*, 1750, 1 Ves. Sen. 536).

Gifts to any persons to perform rites for the supposed benefit of the souls of deceased persons are void (*West v. Shuttleworth*, 1835, 2 Myl. & K. 684; *In re Blandell's Trusts*, 1861, 30 Beav. 360; *Yeap Cheah Neo v. Ong Cheng Neo*, 1875, L. R. 6 P. C. 381; *Heath v. Chapman*, 1854, 2 Drew. 417).

A clause in the Roman Catholic Charities Act, 1860, 23 & 24 Vict. c. 134, enables the High Court or the Charity Commissioners to substitute in some cases lawful Roman Catholic trusts for unlawful ones.

Trusts to keep tombs in repair are void, unless the tombs are part of the ornaments of a church, in which case they are good because trusts to keep in repair the ornaments of a church are good charitable trusts, and so are trusts to keep churches and churchyards in repair (*Hoare v. Osborne*, 1866, L. R. 1 Eq. 585; *In re Rigley's Trusts*, 1866, 15 W. R. 190; *Vaughan v. Thomas*, 1886, 33 Ch. D. 187).

A bequest upon trust to apply the income or any part of the capital of trust funds "in grants for or towards the purchase of advowsons or presentations" is not a good charitable gift (*In re Hunter, Hood v. A.-G.*, 1897, W. N. 24).

Religious orders of men bound by monastic vows are forbidden by law (10 Geo. IV. c. 7), and gifts for the support of such orders are therefore void. Other orders are not forbidden, and are therefore lawful associations. If they have charitable objects they are good charities, and a perpetual

trust for them may be created (*Henrion v. Bonham*, sub *Sugden*, L. C. Ir.; *O'Leary on Charities*, 90; *Cocks v. Mannors*, 1871, L. R. 12 Eq. 574; *Mahony v. Duggan*, 1880, L. R. 11 Ir. 260; *In re Wilkinson's Trusts*, 1887, L. R. 19 Ir. 531). If they have no charitable objects they are like clubs, and an immediate gift to such an institution is a good private gift to the members thereof (*Cocks v. Mannors*, 1871, L. R. 12 Eq. 547); while a perpetual trust for such an institution is void for remoteness (*Carne v. Long*, 1860, 2 De G. F. & J. 75; *In re Clark's Trust*, 1875, 1 Ch. D. 497; *In re Dutton*, 1878, 4 Ex. D. 54; *Kehoe v. Wilson*, 1880, L. R. 7 Ir. 10; *Morrow v. McConville*, 1883, L. R. 11 Ir. 236; *In re Sheraton's Trusts*, W. N. 1884, 174; *Thomson v. Shakespeare*, 1859, John. 612; 1860, 1 De G. F. & J. 399; *In re Amos, Carrier v. Price*, 1891, 39 W. R. 550).

A friendly society to provide for members or widows of members in poverty is a charity (*In re Buck, Bruty v. Mackey* [1896], 2 Ch. 727); but a society to provide for widows in any event is an insurance company and not a charity (*Cunnack v. Edwards*, W. N. 1895, 35).

An immediate gift to ministers of religion to be selected by any person is a private gift (*Thomas v. Howell*, 1874, L. R. 18 Eq. 198), but a general gift for the benefit of the ministers of any place or denomination, or a perpetual gift for any of such ministers, is a charity (*Lloyd v. Spillet*, 1734, 3 P. Wms. 344; *A.-G. v. Cook*, 1751, 2 Ves. 273; *A.-G. v. Gladstone*, 1842, 13 Sim. 7).

Gifts for the benefit of the poor, or the poor of any particular place, or poor ministers, maidens, or boys, are good charitable gifts; and gifts for the benefit of widows, orphans, children, old persons, and even sons of clergy, without the word poor, have also been held to be charitable; and for the poor of any denomination, or of all except one (*Collinson v. Pater*, 1831, 2 Russ. & M. 344; *Bruce v. The Presbytery of Deer*, 1867, L. R. 1 H. L. Sc. 96). The poor in such cases is generally held to mean the poor who are not receiving parochial relief (*A.-G. v. Braudreth*, 1842, 1 Y. & C. Ch. C. 200), but the fund may be applied so as to benefit all classes of poor people (*A.-G. v. Bovill*, 1840, 1 Ch. 762).

An immediate gift to poor relations is a private gift, but a perpetual trust for them is treated as a charitable gift for the poor, with a preference for poor relations (*A.-G. v. Sidney Sussex College*, 1869, L. R. 4 Ch. 722; *Gillam v. Taylor*, 1873, L. R. 16 Eq. 581).

A trust to publish a book is a charitable trust if the nature of the book is such as to make its publication a charitable object; and a book promoting any form of religion, such as the hallucinations of Joanna Southcote, is charitable (*Thornton v. Howe*, 1862, 31 Beav. 14).

Associations for enforcing the law are charities, such as the Society or the Prevention of Cruelty to Animals (*Tatham v. Drummond*, 1864, 34 L. J. Ch. 1); but associations for promoting alterations in the law, though lawful associations, could not well be deemed charities; but they may be deemed charities if they have other charitable purposes (*In re Foveaux's Estate, Cross v. London Anti-Vivisection Society* [1895], 2 Ch. 501).

Gifts for the relief of debtors have always been deemed charitable; but gifts to pay the fines of persons imprisoned for misdemeanours are void as against public policy (*Thrupp v. Collett*, 1858, 26 Beav. 125).

#### VALID AND INVALID GENERAL EXPRESSIONS, AND ALTERNATIVE AND INCOMPLETE GIFTS.

When a power is given by will to two or more, very slight expressions in the will are considered sufficient to show that the power is not exercis-

able for the benefit of the donees themselves, but that they are trustees of it, and can only exercise it for some purpose intended by the testator. If the testator, then, has not made his purpose clear, the power and trust are void for uncertainty; but if he has shown a charitable purpose, the gift is good, and the property must be applied for some charity. If the donees of the power then fail to appoint, the fund will be applied by the Court, if the testator has at all indicated the objects of his bounty, but by the Crown, if he has given no indication (*Moggridge v. Thackwell*, 1792, 7 Ves. 36; 6 R. R. 76; *In re Dean, Cooper Dean v. Stevens*, 1889, 41 Ch. D. 552).

Some narrow decisions have been given to the effect that gifts for "private charity" are invalid, upon the verbal ground that no objects are charitable unless they are for public benefit (*Ommanney v. Butcher*, 1823, 1 Turn. & R. 260; 24 R. R. 42).

The following expressions have been held to create good charitable gifts:—

Charity; charitable; pious uses (*A.-G. v. Herrick*, 1772, 2 Amb. 712).  
Charities, societies, and institutions (*Obert v. Barrow*, 1887, 35 Ch. D. 472).

The service of my Lord and Master, and, I trust, Redeemer (*Powerscourt v. Powerscourt*, 1824, 1 Mol. 616).

Purposes having regard to the glory of God in the spiritual welfare of His creatures (*Townsend v. Carns*, 1844, 3 Hare, 257).

Any religious institution or purposes (*Wilkinson v. Lindgren*, 1870, L. R. 5 Ch. 570).

Religious and charitable institutions and purposes (*Baker v. Sutton*, 1836, Keen, 224).

Knowledge (*President of U. S. v. Drummond*, 1838, cit. 7 H. L. 155).

Learning in seminaries (*Curtis v. Hutton*, 1808, 14 Ves. 537).

Education and learning (*Whicker v. Hume*, 1858, 7 H. L. Cas. 124).

Benefit and advantage of Great Britain (*Nightingale v. Goulbourn*, 1848, 2 Ph. Ch. 594).

Spread of the gospel (*Lea v. Cooke*, 1887, 34 Ch. D. 528).

Charitable and deserving (*Stone v. A.-G.* 1885, 28 Ch. D. 464).

Unnamed religious societies (*In re White* [1893], 2 Ch. 41).

The poor and the service of God (*In re Darling* [1896], 1 Ch. 50).

Religious and benevolent societies or objects (*In re Lloyd, Lloyd Greame v. A.-G.*, 1893, 38 S. J. 50).

Under the following words and expressions the trust has been held void for indefiniteness:—

The interests of virtue and religion, and the happiness of mankind (*Brown v. Ycall*, before 1791, 10 Ves. 27; 6 R. R. 781 n. 1).

Charity such as masses (*Boyle v. Boyle*, 1877, L. R. 11 Eq. 433).

Benevolence and liberality (*Morice v. Bishop of Durham*, 1805, 10 Ves. 521; 7 R. R. 232).

Benevolent purposes (*James v. Allen*, 1817, 3 Mer. 17; 17 R. R. 4).

Missionary purposes (*Scott v. Brownrigg*, 1881, L. R. 9 Ir. 246).

Charitable or public (*Vezey v. Jamson*, 1822, 1 Sim. & St. 69).

Hospitality or charity (*Mayor of Gateshead v. Hudspeth*, 1883, 49 L. T. 587).

Benevolent, charitable, and religious (*Williams v. Kershaw*, 1835, 1 Keen, 227).

Charitable or other purposes (*Ellis v. Selby*, 1836, 1 Myl. & Cr. 286).

Deserving literary men, or expenses of publishing testator's manuscripts (*Thompson v. Thompson*, 1844, 1 Coll. 381).

Charitable or philanthropic ([1896], 2 Ch. 451).

Specific charitable purposes, or encouraging undertakings of general utility (*Kendall v. Granger*, 1842, 5 Beav. 300).

Sick poor, or any other utilitarian purposes (*In re Woodgate*, 1886, 30 S. J. 517).

Charitable or benevolent (*Learners v. Clayton*, 1878, 8 Ch. D. 584).

True religion in general and the comfort of the servants of God in particular (*Budget v. Halford*, 1873, W. N. 175).

These cases show that a trust in the alternative for charitable or indefinite purposes is void; also the Courts refuse to regard the words benevolent, philanthropic, or even public as included in charitable. Yet gifts for public purposes at specified localities have repeatedly been held good (*Dolan v. Macdermot*, 1867, L. R. 5 Eq. 60; 1868, L. R. 3 Ch. 676; *Wilkinson v. Barker*, 1872, L. R. 14 Eq. 96), and purposes conducing to the good of a county (*A.-G. v. Earl of Lonsdale*, 1827, 1 Sim. 105).

If a testator has not completely expressed his intention, but has defined the property or amount intended to be given, and it is clear that he intended it for some charitable purpose or purposes, effect will be given to the gift; but if the amount is uncertain, or there is not a clear charitable intention expressed, the gift will fail (*In re White* [1893], 2 Ch. 41; *Gillan v. Gillan*, 1878, L. R. 1 Ir. 114; *Aston v. Wood*, 1868, L. R. 6 Eq. 419; *Mayor of Gloucester v. Osborn*, 1847, 1 H. L. 272).

#### GIFTS TO DOUBTFUL AND DEFUNCT SOCIETIES.

It often happens that a testator expresses to give a legacy to some society, and no society can be found exactly answering the name and description employed by him. The gift then is not void for uncertainty (*Bunting v. Marriott*, 1854, 19 Beav. 163); but the Court will decide what society is meant (*Middleton v. Clitherow*, 1798, 3 Ves. 734; *In re Doane*, *Times Reports*, 26 Oct. 1892). If the society cannot be identified, the Court will apply the money *cy-près* (see *infra* p. 470), that is to say, as nearly according to the testator's intention as is practically possible (*Simon v. Barber*, 1828, 5 Russ. 112). The Court may, however, sanction an agreement for division between rival claimants (*In re Briscoe's Trusts*, W. N. 1872, pp. 42, 76).

If the society named by the testator has ceased to exist before his death, the gift lapses (*In re Rymer* [1895], 1 Ch. 19); but if it exists at his death, and is closed before payment of the legacy, the fund has become devoted to charity, and will be applied *cy-près* (*In re Slevin* [1891], 2 Ch. 236). If, however, a bequest is made to a society not as part of its funds, but upon some special trust, the trust will not fail for default of the trustee (*A.-G. v. Stephens*, 1834, 3 Myl. & K. 347).

When legacies were given to two societies, which amalgamated before the testator's death, the combined society was held entitled to both legacies (*In re Jay, Purday v. Johnson*, *Times Reports*, 8 Dec. 1888).

The close of one branch of a society will not cause a legacy to lapse (*In re Bradfield*, 1892, 36 S. J. 646).

#### OBJECTS IN FOREIGN COUNTRIES.

The cases on trusts for objects in foreign countries are not satisfactory. Some such trusts of a political nature have been held to be void (*De Thémmines v. De Bonnavat*, 1828, 5 Russ. 288; *Habershon v. Vardon*, 1851, 4 De G. & Sm. 467), and a trust to establish a new charity in Pennsylvania was held to fail, where the President and Vice-President of the United States and the Governor of Pennsylvania were named trustees and declined

to act (*New v. Bonaker*, 1867, L. R. 4 Eq. 655). If the object proposed in a foreign country would not be good in England, the trust is void (*In re Elliott*, W. N. 1891, p. 9; *De Garcia v. Lawson* 1798, 4 Ves. 433 n.), and if not good in the foreign country it is void also. But if it is clear that the object will be carried out, it is good (*In re Geck*, W. N. 1893, p. 161) and the Court may order the fund to be paid to trustees in the foreign country (*Emery v. Hill*, 1826, 1 Russ. 112; 25 R. R. 11).

#### REMOTENESS.

When a gift is made to a charitable object which cannot be effected at once, the Court holds the fund in suspense for a sufficient time to see if it can be effected, and only holds the gift to fail if it becomes clear on inquiry that it is not likely to be carried out in a reasonable time (*In re White's Trusts*, 1882, 33 Ch. D. 449; *Biscoe v. Jackson*, 1887, 35 Ch. D. 460).

A gift over from one charity to another is good, and is not liable to be held void for remoteness (*Christ's Hospital v. Grainger*, 1849, 1 Mac. & G. 460; *In re Tyler* [1891], 3 Ch. 252).

In some cases a clause providing that the fund shall revert to the donor if the charity becomes extinct, is good (*In re Bowen* [1893], 2 Ch. 491; *Randell v. Dixon*, 1888, 38 Ch. D. 213).

In some cases a charitable gift has been held void for remoteness, when it did not commence within legal time (*Alt. v. Lord Stratheden and Campbell* [1894], 3 Ch. 265; *In re Roberts*, 1881, 19 Ch. D. 520; *Chamberlayne v. Brockett*, 1872, L. R. 8 Ch. 206).

#### SCHEMES.

The Court has jurisdiction to settle a scheme for the management of a permanent charity where the directions of the founder of the charity are not complete, and he has not conferred power on any specified persons to settle a scheme; but the Court cannot alter an existing charity without statutory authority ([1896], 1 Ch. 879).

#### THE CY-PRÈS DOCTRINE.

In charity cases we constantly meet with references to the *cy-près* doctrine, or principle of applying property as nearly as possible according to the donor's intentions, when these intentions cannot be exactly carried out.

When a donor has devoted property for ever to the performance of some charitable purpose for which there is scope at first, such as the release of captives in Barbary, but in the course of time there cease to be any objects of such charity; in such cases it is settled law that property once devoted to charity is so devoted for ever, and on failure of the primary object, the property will be applied to some other charitable purpose (*Wilson v. Barnes*, 1886, 38 Ch. D. 507; *Spiller v. Maude*, 1881, 32 Ch. D. 158 n.).

A second class of cases in which the *cy-près* doctrine is referred to comprises those in which property is devoted to some charitable purpose, which exhausts the income at first, but in the course of time the income grows and shows a surplus. Many instances of the application of the principle in such cases were afforded by devises of land in London to city companies in ancient times, and some have been afforded by devises to colleges in the Universities. The leading case upon the subject is the *Thetford School* case, 1609, 8 Co. Rep. 130.

A third class of cases is that in which the entirety of certain property is

devoted to some charitable purpose, which does not exhaust the income in the first instance (*Bishop of Hereford v. Adams*, 1802, 7 Ves. 324; see 6 R. R. 76).

There is also a fourth class of cases in which a testator has devoted property to some charitable purpose, but owing to some impediment either of law or of the consent of some person or persons, or the default of some expected set of circumstances, the testator's object cannot be carried out in the manner pointed out by him. The Courts have then held in some cases that the testator had only a particular intention, and, that failing, the gift has failed. But in other cases they have held that, beyond the particular intention expressed, there was a general intention of charity, and then the failure of the particular intention has let in the general intention, and the Court has applied the fund *cy-près*. The best principle on which such a distinction can be logically based is, that when the gift can be read as devoting the property to charity, and adding a condition subsequent to the gift, then, if the performance of the condition becomes impossible, the gift becomes absolute; whereas, if the condition is precedent to the gift, and the condition becomes impossible, the gift fails altogether. But it is difficult to reconcile all the cases with this principle (*A.-G. v. Downing*, 1766, Amb. 549, 571; *Rodwell v. A.-G.*, *Times Reports*, 8 June 1886; *Moggridge v. Thackwell*, 1803, 7 Ves. 36; 6 R. R. 76; *Biscoe v. Jackson*, 1887, 35 Ch. D. 460; *Chamberlayne v. Brockett*, 1872, L. R. 8 Ch. 206; *In re Taylor's Estate*, 1888, 58 L. T. N. S. 538; *Hoare v. Hoare*, 1886, 56 L. T. N. S. 147).

#### DEATH DUTIES.

A charitable gift is in general subject to a legacy or succession duty of 10 per cent. on its capital value. See DEATH DUTIES.

#### Literature.

The following is a chronological list of the principal books which have been published on the Law of Charities.—

Herne on *Charitable Uses*; a small book published in 1660.

Duke on *Charitable Uses*, published in 1676. An edition of this work by Bridgman appeared in 1805. It is usual to cite it in the following way:—Duke 45, B. 630, meaning thereby to refer to the forty-fifth page of Duke's original work, and the six hundred and thirtieth of Bridgman's edition.

Highmore on *Mortmain*, 2nd ed., 1809.

Shelford on *Mortmain*, 1836.

Boyle on *Charities*, 1837.

Tudor on *Charities*, 1st ed., 1854; 2nd ed., 1862.

Cooke and Harwood's *Charitable Trusts Acts*, 2nd ed., 1867.

Whiteford on *Charities*, 1878.

Kenny on *Endowed Charities*, 1880, contains much useful information, principally gathered from Parliamentary Reports.

Mitcheson on the *Charity Commission Act*, 1887.

Tyssen on *Charitable Bequests*, 1888.

A third edition of Tudor on *Charities* appeared in 1890, comprising the Charity Commission Acts as well as the original Tudor.

The *New Law of Charitable Bequests*, 1891, by A. D. Tyssen, and the *Mortmain and Charitable Uses Act*, 1891, by L. S. Bristowe, both deal with the Act of that year.

The *Law of Parochial Charities*, 1895, by J. T. Dodd.

See CHARITY COMMISSION.



**Charity.**—See ALMS; CHARITIES.

**Charity Commission.**—The statutes now regulating the Charity Commission are: The Charitable Trusts Act, 1853, 16 & 17 Vict. c. 137; the Charitable Trusts Amendment Act, 1855, 18 & 19 Vict. c. 124; the Charitable Trusts Acts, 1860, 23 & 24 Vict. c. 136; 1862, 25 & 26 Vict. c. 112; 1869, 32 & 33 Vict. c. 110; 1887, 50 & 51 Vict. c. 49; the Charitable Trusts (Recovery) Act, 1891, 54 Vict. c. 17; and the Charitable Trusts (Places of Religious Worship) Amendment Act, 1894, 57 & 58 Vict. c. 35.

The jurisdiction vested in the Charity Commission was primarily one of inquiry, and of control over the corpus of charitable estates, to which more detailed reference will be made later. To this there were eventually added important judicial powers arising out of the inherent jurisdiction of Courts of equity in charitable matters. The first step in this direction was in the nature of a simplification of the old Chancery procedure. The C. T. Act of 1853, s. 28, in the case of charities whereof the yearly income exceeds £30 a year, confers upon equity judges in chambers, on the application of any person authorised by the order or certificate of the Board of Charity Commissioners, or on the application of the Attorney-General, the same jurisdiction relating to a charity as the Court of Chancery had upon information. In the case of charities of which the income does not exceed £30, the same Act (s. 32) confers the like jurisdiction, subject to the like authorisation, upon County Courts. The discretion of the Board to make such authorisation is in effect limited to the persons mentioned in the next paragraph (*ibid.* s. 43; Tudor's *Charitable Trusts*, 3rd ed., p. 508).

The C. T. Act, 1860, s. 2, gives to the Board of Charity Commissioners the power to make such effectual orders relating to a charity as might then be made by any judge of the Court of Chancery or by any County Court, for the appointment or removal of trustees of any charity, or for the removal of any school master or mistress, or other officer thereof, or for or relating to the assurance, transfer, payment, or vesting of any real or personal estate belonging thereto, or entitling the Official Trustees of Charitable Funds, or any other trustees, to call for a transfer of and to transfer any stock belonging to such estate, or for the establishment of any scheme for the administration of any such charity. But this jurisdiction can only arise upon the application of any person or persons who under the C. T. Act, 1853, s. 43, might be authorised to apply to any judge or Court for the like purposes, *i.e.* all or any one or more of the trustees or persons administering or claiming to administer, or interested in, the charity which is the subject of such application, or any two or more inhabitants of any parish or place within which the charity is administered or applicable. But further, the C. T. Act, s. 4, enacts that the Board shall not make any order with respect to any charity of which the gross annual income, exclusively of the yearly value of any buildings or land used wholly for the purposes thereof, and not yielding any pecuniary income, shall amount to £50 or upwards, except upon the application of the trustees or persons acting in the administration thereof, or a majority of them.

By virtue of the C. T. Acts, 1860, s. 8, and 1869, s. 10, the orders of the Board are subject to an appeal to the Chancery Division, but such appeal can only be made by the Attorney-General, or some person authorised by him, or by the Board. The Court will refuse to interfere with the

exercise of the Commissioners' discretion unless a strong case of mistake or miscarriage of justice is made out (see *In re Burnham National Schools, ex parte Bates*, 1874, L. R. 17 Eq. 241; 43 L. J. N. S. Ch. 340; 22 W. R. 198; *Tudor*, 3rd ed., p. 101).

The C. T. Act, 1860, s. 11, also extends the jurisdiction of County Courts to charities of which the income does not exceed £50. But the actual effect of the Act has been to confine all original jurisdiction over charities to the Charity Commission, subject to the following important general limitations: (1) The jurisdiction can only arise upon application made to the Commissioners; (2) where the yearly income exceeds £50, such application must be made by the trustees or a majority of them; (3) in making schemes, the Commissioners, as standing in the place of Courts of equity, can only act within the limits of the equitable doctrine of *cy-près*; as to which, see article CHARITIES.

In addition to these general limitations, the C. T. Act, 1860, s. 5, provides that the Board shall not exercise their jurisdiction in any case which, by reason of its contentious character, or of any special questions of law or fact which it may involve, or for other reasons, they may consider more fit to be adjudicated upon by any of the judicial Courts. But note that "this section does not deprive the Charity Commissioners of jurisdiction over contentious cases. It merely enables them to decline to exercise that jurisdiction where they consider that the case might be better dealt with in a court of law (*In re Burnham National Schools*, 1874, L. R. 17 Eq. 241"; *Tudor*, 3rd ed., p. 565).

Further, certain classes of charities are specially exempted from the operation of the Charitable Trusts Acts altogether (C. T. Act, 1853, s. 62). The principal exemptions are: (1) The Universities of Oxford, Cambridge, London, and Durham; (2) registered places of meeting for religious worship, *bonâ fide* used as such; (3) institutions maintained wholly by voluntary contributions; whilst (4) in the case of charities maintained partly by voluntary subscriptions and partly by income from endowment, the jurisdiction applies to the income from endowment only, to the exclusion of the voluntary subscriptions. And under this head the following donations and bequests are also exempt:—(a) Donations and bequests of which no special application or appropriation is directed by the donor or testator, and which may be legally applied as income in aid of the voluntary subscriptions; (b) the like donations, bequests, and voluntary subscriptions, even though appropriated and invested by the governing body for some specific object connected with the charity; (c) donations and bequests in aid of a fund so appropriated (*Tudor*, 3rd ed., p. 526). For the interpretation of the confused and obscure provisions of the section, see *Tudor*, 3rd ed., pp. 526–528; and *The Corporation of the Sons of the Clergy v. Sutton*, 1860, 29 L. J. N. S. Ch. 393; 1 L. T. N. S. 386; and *The Royal Society of London v. Thompson*, 1881, 17 Ch. D. 407. Note further, the concluding words of the section: Provided always that the said exemption shall not extend to any cathedral, collegiate, chapter, or other schools.

The C. T. Act, 1869, s. 14, provides that the benefit of the Acts, or any special provisions thereof, may be extended to an exempted charity by an order of the Board made upon application of the trustees.

The C. T. Act, 1894, s. 4, extends the exemption in favour of registered places of meeting for religious worship to certain land or buildings held in connection therewith. On the other hand, the C. T. Act, 1869, s. 15, extends to charities of this class so much of the Acts as relates to orders of the Board for the appointment or removal of trustees of a charity, or for the

vesting of any real or personal estate, or for the establishment of a scheme, subject to the proviso that no such order may be made except upon the application of the trustees, as in C. T. Act, 1860, s. 4, or 1869, s. 5. The result is that the trustees of chapels, etc., are at liberty to avail themselves of the jurisdiction of the Commissioners for the purpose of supplementing or varying their own legal powers, should they desire to do so, whilst they are exempt from the inquisitorial powers of the Commissioners (cp. *Tudor*, 3rd ed., pp. 589-590).

It remains to advert briefly to the specific inquisitorial and administrative powers conferred upon the Charity Commissioners. Under the first of these classes of powers is included the power of demanding accounts, whereby the trustees of every charity subject to the jurisdiction are required to render annual accounts, and transmit a copy thereof to the Charity Commissioners (C. T. Act, 1855, s. 44), and of prosecuting inquiries.

Turning to administrative powers, the C. T. Act, 1855, s. 29, places in the hands of the Charity Commissioners the control over dealings with the corpus of charities falling within the jurisdiction, by forbidding trustees to make any sale, mortgage, or charge of the charity estate, or any lease thereof in reversion after more than three years of any existing term, or for any term of life, or in consideration wholly or in part of any fine, or for any term of years exceeding twenty-one years, without the approval of the Board, or the express authority of Parliament, or of a Court of competent jurisdiction. Note that the reservation of the authority of Parliament operates to exempt sales under the Lands Consolidation Act, 1845, from the jurisdiction of the Commissioners (*Tudor*, 3rd ed., p. 548).

In authorising a mortgage, the Board must order provision for discharging the debt within a period of thirty years (C. T. Act, 1855, s. 30).

For the protection of the corpus of charitable estates, note the institution of the Official Trustee of Charity Lands as a corporation sole, in whom lands may be vested as a bare trustee (C. T. Act, 1855, s. 15; 1853, ss. 47-50; and *Tudor*, 3rd ed., p. 512); and of the Official Trustees of Charitable Funds (C. T. Act, 1853, s. 51; and for other references, *Tudor*, 3rd ed., p. 514).

The following powers also require notice:—

Power to authorise exchanges (C. T. Act, 1853, ss. 24, 26; 1855, ss. 32, 34, 38; and *Tudor*, 3rd ed., pp. 267, 268). Exchanges are generally better effected by the authority of the Board of Agriculture (*q.v.*), because, whereas the Charity Commissioners have merely power to authorise exchanges, the Board of Agriculture (formerly the Lands Commissioners) have power to carry them into effect (*Tudor*, p. 268). On the other hand, it is sometimes convenient to have recourse to the Charity Commissioners for the purpose of an exchange, inasmuch as the Board of Agriculture have no power to compensate for inequality of value except by a rent-charge, whereas the Charity Commissioners have power to authorise payments in equality of exchange (C. T. Act, 1855, s. 32).

As to partitions, the Board have no express power to authorise partitions, though they have power to authorise payments by way of equality of partition. See, however, *Tudor*, 3rd ed., pp. 549 and 550.

Power to authorise repairs and improvements (C. T. Act, 1853, s. 21; see *Tudor*, 3rd ed., p. 486). The Charity Commissioners usually require any capital expenditure under this head to be recouped out of income.

As to purchase of land: this is included, though not expressly, under the general power contained in C. T. Act, 1860, s. 15, to authorise the application of moneys belonging to any charity to any purpose or object which the Board consider beneficial to the charity, and which is not

inconsistent with the trusts or intention of the foundation. See *Tudor*, 3rd ed., pp. 494 and 572. Sites for buildings for the purposes of the charity may be purchased with the consent of the Commissioners under the provisions of the Lands Clauses Consolidation Act, 1845 (C. T. Act, 1853, s. 27).

Power to authorise redemption of rent-charges (C. T. Act, 1853, s. 25; cp. 1855, s. 33; *Tudor*, 3rd ed., p. 492). Orders for such redemption are made on the joint proposal of the trustees of the charity and the person out of whose land the rent-charge issues.

Power to authorise compromise of claims for or against the charity (see C. T. Act, 1853, s. 23; 1855, s. 31).

Power of advice. The Charity Commissioners are authorised to receive and consider applications for their advice and direction concerning charities, and persons acting on their advice are indemnified (C. T. Act, 1853, s. 16).

Power to authorise legal proceedings. No legal proceeding (not being an application in any matter actually pending) for obtaining any relief, order, or direction relating to any charity, may be brought otherwise than upon the certificate of the Board, except by the Attorney-General, provided that this shall not affect any proceeding in which any person shall claim any property or seek any relief adversely to any charity (C. T. Act, 1853, s. 17; see *Tudor*, 3rd ed., pp. 477-482). Note that "matter actually pending" means pending at the time of the application (*In re Lister's Hospital*, 1857, 6 De G. M. & G. at p. 187; and see *Tudor*, *loc. cit.*). The section does not extend to any proceeding which, prior to the Judicature Act, 1873, could have been brought only in a Court of common law, as an action of trespass or ejectment (per Jessel, M. R., in *Holme v. Guy*, 1868, 5 Ch. D. at p. 905). As to "claiming adversely," see *Brittain v. Overton*, 1884, 25 Ch. D. 41; and *Benthall v. Earl of Kilmorcy*, 1884, 25 Ch. D. 39.

Lastly, large additional powers have been conferred upon the Charity Commissioners by the Endowed Schools Acts and the Welsh Intermediate Education Act (see ENDOWED SCHOOLS); the Allotments Extension Act, 1882 (see ALLOTMENTS); the City of London Parochial Charities Act, 1883, which conferred, with respect to these charities, special powers of scheme-making in excess of the limits of the doctrine of *cy-près*; and the Municipal Corporations Act, 1883, empowering the Commissioners to make schemes, as if under the Charitable Trusts Acts, for the property of the corporations thereby dissolved. As to action of the Charity Commissioners under the Local Government Act, 1894, see PARISH COUNCIL.

**Chart.**—See COPYRIGHT.

**Charter-Party.**—"The term charter-party is generally understood to be a corruption of the Latin words *carta partita*, the two parts of this and other instruments being usually written in former times on one piece of parchment, which was afterwards divided by a straight line cut through some word or figure so that one part should fit and tally with the other as evidence of the original agreement and correspondence, and to prevent the fraudulent substitution of a fictitious instrument for the real deed of the parties. With the same design, indentation was afterwards introduced, and deeds of more than one part thereby acquired among English lawyers the name of indenture. This practice of division, however, has long

been disused, and that of indentation is a mere form" (Lord Tenterden, Abbott, *Shipping*, 5th ed., 163). A charter-party may be defined as a contract between a shipowner and a merchant for the hire of a ship for a particular voyage, or voyages, or period of time. Formerly it was made by deed, and, if made in writing only, was called a memorandum of charter-party; but now the latter form is that universally adopted, one reason for this perhaps being that they are often made by agents on behalf of other persons, and agents cannot execute a deed for their principals unless authorised to do so by deed. It is not proposed in this article to treat of the general rights and liabilities of shipowners and charterers *inter se* in respect of the contract of affreightment or the cargo which is the subject of it (see under AFFREIGHTMENT and CARGO), but only of the characteristics of a charter-party as a contract. And the object falls conveniently under the following heads: (a) The nature and effect of the contract; (b) its form; (c) the persons entitled and liable under it respectively; (d) the relative importance of one part of the contract compared with another; (e) the breach of the contract.

(a) *Nature and Effect of the Contract*.—Ships may be chartered for different purposes, for carrying a cargo, for saving another ship, or for carrying passengers; but the two latter cases fall under the heads of SALVAGE and PASSENGERS. For the carriage of cargo a charter-party may be one of three different kinds. It may amount to an absolute demise or letting to hire of the ship itself with its apparel to the charterer, who has to man, provision, and navigate her, *locatio navis*; or it may be a demise of the ship in a state fit for mercantile adventure, *i.e.* equipped, manned, and provisioned by the shipowner, but controlled and navigated by the orders of the charterer, *locatio navis et operarum magistri et nauticorum*; or it may be a letting of the use of the ship for hire by which the shipowner engages to carry the charterer's goods in his ship and by his servants, the charterer not interfering with the control and direction of the ship, *locatio operis vehendarum mercium* (*Schuster v. M'Kellar*, 1857, 7 El. & Bl. 704). The only importance of this classification is that the person who is the owner *pro hac vice* of the ship is responsible to third parties for the acts of the master and crew who are in charge of her; *e.g.* in tort for damage due to other ships by negligent navigation, and in contract on bills of lading signed by the master, or for necessaries ordered by him on the credit of the ship. The decisions establish that ownership of the vessel for these purposes depends on whether the terms of the charter-party pass the possession and control of the ship to the charterer. It may be said at once that contracts of the first kind make the charterer owner, while those of the third do not; the chief difficulty has been with regard to the second kind. Generally speaking, where there is a complete transfer of the ship, whether in a state of thorough equipment or not, to the charterer, he becomes her owner *pro hac vice*. Thus, where a steamer was let by charter-party for twelve months, the registered owners engaging to keep the engine in repair, but the charterer binding himself to do all other repairs, pay all wages and charges of navigating her, and indemnify owners against all costs, debts, damages, and expenses incurred in respect of the charter-party and employment of the vessel, while the owners were to appoint the engineer; and the charterer, who acted as captain, had repairs done to the vessel by parties unacquainted with this contract, it was held that the registered owner was not liable to pay for them (*Reeve v. Davis*, 1834, 1 Ad. & E. 312). So where by the charter-party the ship was to be placed under the directions of the charterer, to be employed by him for conveyance of merchandise or cable service, and was let for his sole use for three or more calendar months

at his option, he engaging to pay freight till he returned her, and find all ship's stores, and pay all crew's wages and repairs of engines and boilers, and appoint the captain, while the owner was to pay the insurance on the vessel only, the latter was held not liable for wages due to seamen appointed by the captain (*Meiklerid v. West*, 1876, 1 Q. B. D. 428). If the charterers work and manage the ship by means of their servants, they are clearly her owners (*Burnard v. Sharpley*, 1862, 31 L. J. C. P. 334, where the ship belonged to two joint owners, and was worked on the principle of "thirds," one owner who worked her as charterer taking two-thirds, and the other one-third, and it was held that the former was liable for a collision due to the fault of the master. So *The Lemington*, 1874, 2 Asp. 475). Where both shipowner and charterer take part in working and managing the ship, one working her while the other manages her, it is a more difficult question. Under a charter-party which chartered the ship for six months at £20 a week, owners to keep her in good and efficient order for the conveyance of goods, merchandise, and passengers to and from Newcastle and Goole, or any other coasting station which the charterer may from time to time employ the vessel in, the charterer to pay all disbursements, including harbour dues, pilotages, seamen's and captain's wages, and coals, and oil, tallow, etc., for engines, and to insure vessel for £3000, policy to be deposited with the owners, the shipowners were held liable for a collision on the construction of the charter-party, and *a fortiori* on proof that the charterer had no power to appoint or dismiss the officers and crew, and did not interfere in the arrangements of the ship (*Fenton v. Dublin Steam P. Co.*, 1838, 8 Ad. & E. 835). While in another case where a vessel was chartered to Government as a transport at £1 per ton of her registered tonnage for each calendar month of the service, the owners to have the ship in good condition and properly provided and manned, and the master to receive on board such soldiers, horses, etc., or whatever else should be directed, and proceed with them to such places as he should be directed, under such convoy as the commissioners or officers in chief whose command he should be under should direct, and land and deliver the same, and so from time to time during his continuance in the service, and the owners appointed the master and crew, Lord Ellenborough held that the possession of the ship passed to the Crown; and her owners were exempted from liability to light dues (*Trinity House v. Clark*, 1815, 4 M. & S. 288). Lord Ellenborough called attention to the words of the charter-party by which "the vessel was granted and to hire and freight let," as being proper words of demise; but similar words in another charter-party have been held not to give the charterer, but to give the owner, the freight due on bills of lading signed by the master (*Christie v. Lewis*, 1821, 2 B. & B. 410; 23 R. R. 483). The general test seems to be "whose servants the master and crew were" (Patteson, J., *Fenton's case*, above); if the owner has the power of appointing and dismissing them, he remains owner of the ship (*Dean v. Hogg*, 1834, 10 Bing. 345; *Dalzell v. Tyrer*, 1858, 28 L. J. Q. B. 52; *The Great Eastern*, 1868, L. R. 2 Ad. & Ec. 88; *Omoa v. Huntley*, 1877, 2 C. P. D. 464); while if the charterer has that power possession of the ship passes to him (*Newberry v. Colvin*, 1830, 7 Bing. 190-1; 1833, 11 Cl. & F. 283; where, by the charter-party the charterer was given the command of the ship, and undertook to navigate the ship, take her into his service for twelve months certain, or so much longer as the voyage should require, and pay for her so much a ton per month, while the owners were to have an agent on board who was to have the sole management of the ship's stores and provisions, and who, in the event of the charterer proceeding to any other than the specified ports without his leave,

was to have power to dismiss him and appoint another commander in his place, and in the event of default by the charterer had power to land a homeward cargo on the owners' account, the owners also undertaking to keep the ship properly victualled, provided, and manned, and having certain spaces on board reserved to them for cargo; and it was held that the charterer was not a servant or agent of the owner, but the temporary owner. And so *Belcher v. Capper*, 1842, 4 Mac. & G. 502). And though the charter-party gives the charterers the right to appoint the master, if it also provides that the owners are to provide and pay for provisions and wages of captain and crew, and the necessary equipment and navigation of the ship, and the owners are to dismiss the captain if he fails to be satisfactory, while the charterers are to pay for all coals, pilotages, port charges, etc., the master is the servant of the shipowner, and has a remedy *in rem* against the ship (*The Beeswing*, 1885, 5 Asp. 484); and this is a common provision in time charters.

An agreement between the owner and master of a ship by which the latter has complete control over her, the former only receiving a third of net profits, is not a demise of the ship, and whatever is the relation thereby created between these parties, the owner is still liable for damage done by the ship owing to the negligence of the captain (*Steel v. Lester*, 1877, 3 C. P. D. 121). If the ship is chartered to the Crown as a transport and acts under the orders of a Government officer, her owners are not liable for her negligent navigation (*Hodgkinson v. Fernie*, 1857, 26 L. J. C. P. 217); while in an earlier case where a ship was let to the Crown as an armed vessel for home service, and was commanded by an officer of the Royal Navy and had a king's pilot on board, but the master and crew were appointed and paid by the owners, these last were held liable for her negligent navigation (*Fletcher v. Braddick*, 1806, 2 Bos. & P. N. R. 182; 9 R. R. 633). Quite recently the law on this point has been summed up by the present Master of the Rolls: "It seems to me after listening to all the cases that have been cited from the time of Lord Ellenborough downwards, that through all the cases it has been assumed that the question depends . . . upon this: whether the owner has by the charter . . . parted with the whole possession and control of the ship, and to this extent that he has given to the charterer a power and right independent of him and without reference to him to do what he pleases with regard to the captain, the crew, and the management and employment of the ship. That has been called a letting or a demise of the ship. The right expression is that it is a parting with the whole possession and control of the ship; and in such case the captain is not the captain of the owner, and if so, he has no authority to bind the owner by any bill of lading or by any contract (and it may be added by any tort of his)" (Lord Esher, *Baumwoll v. Furness* [1892], 1 Q. B. 259). In this case the captain, officers, and crew, except the chief engineer, were appointed, controlled, and paid by the charterer, who also was to indemnify the owner from all liabilities arising from the captain signing bills of lading, the chief engineer being appointed and paid by the owners, who paid for the insurance of the vessel, kept the ship and machinery in efficient repair, and had spaces reserved for officers, crew, tackle, and stores; and it was held that the captain was not the servant of the owners, and did not make them liable on bills of lading signed by him without authority (*ibid.* [1893], App. Cas. 8).

(b) *The Form of Charter-Parties*.—The third kind of charter-party mentioned above is the most common one; under this the charterer only acquires a right to have his goods carried in the shipowner's ship, while the

latter is liable both in contract and in tort for the acts of his servants in charge of her, (*Sandeman v. Scurr*, 1866, L. R. 2 Q. B. 86; *Hayn v. Culliford*, 1878, 3 C. P. D. 410; and 4 ditto. 182). Such a charter-party may be given either for a single voyage,\* or a voyage out and home, or a series of voyages, or a period of time.

It is hardly necessary to say that charter-parties may be in any form that the parties choose to adopt. They may be made by word of mouth (*Lidgett v. Williams*, 1845, 4 Hare, 456), and this is especially the case in coasting vessels (*Biddulph v. Bingham*, 1874, '30 L. T. 30), or may be made by rough memorandum, e.g. "berth note" (*S. S. Rotherfield Co. v. Tweedie*, 1897, 13 T. L. R. 183). There are special charter-parties adapted to certain trades, e.g., Black Sea Charter-Party, 1890; Coal Trade Charter (given in Scrutton, *Charter-Parties*, Appendix); but certain features and outlines are common to them all. The following general form of charter-party, containing the conditions and exceptions in general use, except those peculiar to certain trades, may serve as a specimen, the clauses enclosed in brackets being additions which are available but not necessary:—

It is this day mutually agreed between [agents for] owners of the good ship or vessel called the [Al 12, and newly coppered] of [of the burthen] of tons register measurement or thereabouts, whereof is master now in , and of merchants: That the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed [sail and proceed to or so near thereunto as she may safely get, and there] load [in the usual and customary manner] a full and complete cargo of [or other lawful merchandise] not exceeding tons weight [or what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture], and being so loaded shall therewith proceed to [as ordered before sailing], or so near thereunto as she may safely get, and there deliver the same [in the usual manner] agreeably to bills of lading [if only a single voyage is contemplated, here put the clauses following with regard to payment of freight, the accepted perils, cargo brought and taken from alongside, detention and demurrage, cesser of liability, discharge of vessel, and captain signing bills of lading, etc.], after which she shall load there [or, if required, proceed to some other safe port in or so near thereunto as she may safely get and there load, always afloat], from the charterers, a full and complete cargo of [or other lawful merchandise], the cargoes being brought to and taken from alongside the vessel at charterer's risk and expense [or cargo to be taken from the bank of the river inside the bar or river shore afloat by the ship's boats and crew at ship's risk and expense] [after which the said merchants bind themselves to ship not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture], and being so loaded shall forthwith proceed to [or a safe port in as ordered], or so near thereunto as she may safely get [and always lay and discharge afloat], and there deliver the same in the usual and customary manner to the said charterers or their assigns, they paying freight for the same at the rate of for the delivered for the round out and home [a deduction of a ton to be made if ship be discharged and loaded at , other goods if shipped to pay in customary proportion] [payment whereof to become due and to be made as follows: £ on sailing by charterer's acceptance at three months' date what money master may require for ordinary disbursements of vessel at her port of discharge and loading abroad free of interest, paying 2½ per cent. commission] [cash for steamer's ordinary disbursements at port or ports of loading to be advanced on account of freight] [subject to insurance at current rate of exchange and balance on unloading and right delivery of cargo by good and approved bills in London at two months' date, or cash equal thereto]. [Ship is to have liberty to put on board tons of kentledge copper or other dead weights, and to retain it on board during voyage]. [ running days, Sundays and holidays excepted]. days are to be allowed the said merchants if ship is not sooner despatched for loading in [and like days for all purposes abroad], and days on demurrage over and above the said laying days [and the time herein stated] at £ per day [paying day by day as the same shall become due]. [Time occupied in changing ports, or detention by ice, or quarantine, or frost, or flood, etc., not to count as laying days]. The vessel to be discharged at the port of discharge with all



despatch as customary [or with the usual despatch of the port, or in the usual and customary time, or as fast as ship can deliver]. [Should it be necessary for ship to take in dunnage, same to be provided by owners]. Master to sign bills of lading at such rates of freight as may be required by (the agents) of the charterers [or at any rate of freight, or at current rates of freight if required, on being paid difference in cash or bill] without prejudice to this charter-party. Charterer's liability to cease on cargo being loaded [or on completion of loading and payment of advance], owners [or master] having a lien on cargo for freight, dead freight, and demurrage. The act of God, the Queen's enemies, restraint of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of what nature and kind soever throughout the voyage, etc., being [mutually] excepted. The vessel to be consigned to charterer's agent [abroad or at port of loading or inwards or outwards] [free of commission, on paying usual commissions or usual loading commission of 5 per cent., and at port of discharge 5 per cent. commission]. Five per cent. commission is due on the execution of this charter-party to ship lost or not lost by whom ship is to be reported at the Custom House on her arrival [or on return of ship to she shall be addressed to brokers or their agents at any other port of discharge]. Penalty for non-performance of this agreement the estimated amount of freight. [Subject to owner's approval by telegram].

Signed, A. B.,

C. D. [as agents for E. F. [or by telegraphic authority], or per proc., E. F.].

A form of time charter is given by Carver (Appendix B.) and in *The Beeswing*, ante. Charter-parties are usually effected by shipbrokers, who receive a commission on the amount of freight. See BROKER (SHIP). They require to be stamped in order to be made available at law; the expression charter-party includes any agreement or contract for the charter of any ship or vessel, or any memorandum, letter, or other writing between the captain, master, or owner of any ship or vessel and any other person for, or relating to, the freight or conveyance of any money, goods, or effects on board a ship or vessel (Stamp Act, 1891, s. 49); the stamp duty is 6d., and may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is last executed, or by whose execution it is completed as a binding contract (*ibid.*). A charter-party executed abroad without being stamped may be stamped by any party to it within ten days of its being received in the United Kingdom (s. 50). After execution a charter-party may be stamped with an impressed stamp within seven days after its first execution on payment of the duty and 4s. 6d. penalty, and also after seven days from its execution but before one month, on paying the duty and a penalty of £10; but it cannot be stamped afterwards (s. 51). But if the charter-party has been wholly executed out of the United Kingdom, it has been held, under the former Stamp Act, that it could be stamped within two months after it has been received here on payment of the unpaid duty only (*The Belfort*, 1884, 9 P. D. 215); and the only difference which the present Stamp Act makes is to reduce that time to thirty days (s. 15 (3) a). An unstamped copy signed by the parties may be put in evidence if the original was stamped (*Smith v. Maguire*, 1858, 1 F. & F. 199). It is fatal to a charter-party for one party to make any alteration in it, however immaterial (*Tarrabochia v. Hickie*, 1857, 1 H. & N. 893). For the rules for construction of the contract, see AFFREIGHTMENT.

(c) *Persons Liable and Entitled under the Contract*.—Primarily the persons who are parties to the contract are the proper ones to sue and be sued upon it; but charter-parties are often entered into by agents for the shipowners and the merchants. Generally, where an agent negotiates a charter, if he makes himself a party to it, he inserts in the contract a provision that his liability shall cease as soon as the cargo is shipped, the shipowner having a lien on the cargo for all claims for freight, dead

freight, and demurrage; and this is known as the "cesser clause." There have been numerous decisions under this clause as to the extent to which the charterer's liability ceases when the cargo is shipped, and as to the meaning of the word "demurrage" in it; and "the main rule to be derived from the cases as to the interpretation of the cesser clause in a charter-party is that the Court will construe it as inapplicable to the particular breach (of contract) complained of, if by construing it otherwise the shipowner would be left unprotected in respect of that particular breach, unless the cesser clause is expressed in terms that prohibit such a conclusion." In other words, it cannot be assumed that the shipowner without any mercantile reason would give up by the cesser clause rights which he had stipulated for in another part of the contract" (Lord Esher, *Clink v. Radford* [1891], 1 Q. B. 627). And see DEMURRAGE.

Where a charter-party is made by an agent, the ordinary law with regard to principal and agent applies. For that law, see PRINCIPAL AND AGENT.

The general rules governing the law of agency have been applied to charter-parties in the following cases: Where the charter was made by the brother of the defendant, who had the general management of the latter's business and warehouse, and was a corn factor there, though he lived in London, and sent much corn there by vessels hired, and charter-parties were signed by him p/p the defendant, in spite of no specific authority for or adoption of the charter-party in question, the jury found that the defendant was the principal on the contract (*Smith v. McGuire*, 1858, 27 L. J. Ex. 465). Agents have been held personally liable on the contract which they have signed, where, though they have described themselves in it as agents, they have signed simply in their own names without adding any qualifying words (*Parker v. Winlow*, 1857, 7 El. & Bl. 942; *Oglesby v. Yglesias*, 1858, El. B. & E. 930; *Hough v. Manzanos*, 1879, 4 Ex. D. 104); while merely signing the charter-party as agent will not exempt a party from personal liability, e.g. in a case where the defendants signed "by authority only of, and as agents for A. B. & Co." (a foreign merchant), but were described throughout the charter as "the merchants," they were held personally liable (*Lennard v. Robinson*, 1855, 5 El. & Bl. 125). The learned editors of *Smith's Leading Cases*, however, express an opinion that this decision is not reconcilable with that in *Gadd v. Houghton*, 1876, 1 Ex. D. 356, where the Court of Appeal held that the terms of a sold note "we have this day sold to you on account of A. B., foreign merchants," signed by the brokers in their own names, exempted them from being liable (*Thomson v. Davenport*, 2 Smiths L. C. 368). If the agent is described in the charter-party "as agent," and signs it "as agent," that signature will generally protect him, if there is nothing in the rest of the contract to show that the agent was meant to be the real party to it (*Deslandes v. Gregory*, 1860, 2 El. & El. 610), for "the general rule is that persons who put their names to a document thereby make themselves personally liable, unless they state upon the face of it that they sign it for another" (Crompton, J., in *Deslandes v. Gregory*, quoting Lord Ellenborough's words in *Leadbitter v. Furron*, 1816, 5 M. & S. 349; 17 R. R. 345, a bill of exchange case; and so *Wake v. Harrop*, 1861, 6 H. & N. 766). But the mere form of signature is not conclusive (see *ante*), for the whole charter-party must be looked at in order to see the intention of the parties (*Gadd v. Houghton*, *ante*); and the charter-party may, it seems, be interpreted by extrinsic evidence of that intention. Thus, in a case where the defendants were described in the body of the charter-party as "J. H. & Co. for owners of the good ship X," and also signed it at its foot "for owners, J. H. & Co." it was held that

some letters between the parties were admissible in evidence to explain the charter-party, and show that the defendants were the real principals (*Adams v. Hall*, 1876, 3 Asp. 496). By custom of trade, too, an agent who signs a charter-party "as agent," may be personally liable if he fails to disclose his principal within a reasonable time (*Hutchinson v. Tatham*, 1873, L. R. 8 C. P. 482), though in the absence of trade usage in such a case he would not be so (*Pike v. Ongley*, 1887, 18 Q. B. D. 712, Lord Esher). "If an agent signs by procuration for his principal, he will generally protect himself from liability" (Lord Campbell in *Parker v. Winslow*, *ante*). An agent who signs "by telegraphic authority as agent," does not warrant more than that the telegram, if correct, gave authority, and is not liable for a mistake in the wording of the telegram (*Lilly v. Smales* [1892], 1 Q. B. 456; *Rotherfield S. S. Co. v. Tweedie*, *ante*). The same rule applies to the rights as well as the liabilities under the contract; thus an agent who is personally liable on a charter-party can sue for its breach (*Cooke v. Wilson*, 1856, 1 C. B. N. S. 153). If an agent contracts as principal, and describes himself as the owner of the chartered ship, the real principal cannot sue on the charter; for evidence that the agent is not the principal would contradict the written contract (*Humble v. Hunter*, 1848, 12 Q. B. 310). But "though parol evidence in such a case cannot discharge a party to the contract it can add one" (Willes, J., *Calder v. Dobell*, *ante*); and persons who contract in a charter-party as agents may show that they are themselves the real principals and enforce the contract (*Schmalz v. Avery*, 1851, 16 Q. B. 355); just as for the same reason and in the same way it may be enforced against them (*Carr v. Jackson*, 1852, 7 Ex. Rep. 382). A plaintiff who is not named in the charter-party can sue upon it by disclosing himself as principal, *e.g.* a charterer upon his agent's contract (*Breslau v. Barwick*, 1876, 3 Asp. 355, where the agent's name was inserted throughout by mistake), or a shipowner on charters made by his master (*Pearson v. Goschen*, 1864, 17 C. B. N. S. 352). A master can personally enforce a charter-party which he has made in his owner's behalf, just as he may be made personally liable on it (*Dimech v. Corlett*, 1858, 12 Moo. P. C. 199; *Seeger v. Duthie*, 1860, 30 L. J. C. P. 65); and after a master has had judgment recovered against him, the owner cannot be sued for the same cause of action (*Priestley v. Fernie*, *ante*). An agent who professes to have authority (when he has not) to charter a ship to merchants, is liable to them for breach of warranty of authority, whether he really believed he had such authority or not (*Mitchell v. Kahl*, 1862, 2 F. & F. 709). The extent of an agent's authority depends on the apparent authority given to him by his principal. It has been held that a master who is a part owner does not bind the other owners by a charter-party under seal, though they are liable for his proper performance of his general duties (*Leslie v. Wilson*, 1821, 3 B. & B. 171; 23 R. R. 605); that he cannot authorise a shipbroker at a port to which the ship is going to charter her before arrival (*The Fanny and Matilda*, 1883, 48 L. T. 771), for his authority to bind his owners by charter-party only arises when he is in a foreign port and his owners are not there, and there is difficulty in communicating with them (Brett, L. J., *ibid.*, as in *Pearson v. Goschen*, *ante*); and he has no implied authority to cancel or alter an existing one (*ibid.*, and so *Borgon v. Sharpe*, 1810, 2 Camp. 529; 11 R. R. 788; *Reynolds v. Jex*, 1865, 34 L. J. Q. B. 251); nor has a ship's agent (*Sickens v. Irving*, 1859, 7 C. B. N. S. 165), though the charter-party may give it to him (*Wiggins v. Johnston*, 1845, 15 L. J. Ex. 202); nor has a ship's husband, though he is impliedly authorised to make a charter (*Thomas v. Lewis*, 1878, 4 Ex. D. 18, Kelly, C. B.).

(d) *The Relative Importance of the different Clauses of a Charter-Party.*—In a contract consisting of so many and various clauses as a charter-party, and dealing with a period of time which may be very considerable—e.g. in the case of a long double voyage or a time charter—some provisions must necessarily be more important than others in their effect on the position of the parties. A breach of such a provision by one party may give the other the right to rescind the contract altogether, and the shipowner may be justified in refusing to put his ship at the charterer's disposal, or the charterer in refusing to load a cargo. Such provisions are called conditions precedent; while the less important ones may be either collateral agreements for the breach of which damages may be recovered, but which do not dissolve the contract, or mere representations, giving no right either to dissolve the contract or claim damages. The most comprehensive statement of the law as to conditions precedent in charter-parties is to be found in a judgment of the Exchequer Chamber delivered by Williams, J., in *Behn v. Burness*, 1863, 32 L. J. Q. B. 204. The facts of that case were that under a charter-party, dated October 15, by which a ship “now in the port of Amsterdam, and being tight, staunch, strong, etc., shall with all possible despatch proceed direct to Newport, Mon.,” the ship was on that day at Nieuwdiep, 63 miles from Amsterdam, and outside the limits of that port; she could, with favourable winds, have got there in twelve hours, but owing to the wind being contrary, and the absence of steam-tug power, did not do so till the 23rd; she was discharged there with all possible despatch and proceeded direct to Newport, arriving there on December 1; the charterer refused to load, and it was held that the words “now in the port of Amsterdam” constituted a condition precedent, the breach of which excused the charterer. That part of the judgment which bears on the present point was as follows:—“A representation is a statement or assertion made by one party to the other before or at the time of the contract of some matter or circumstance relating to it. Although it is sometimes contained in a written instrument it is not an integral part of the contract, and consequently the contract is not broken, although the representation proves to be untrue, nor (with the exception of policies of insurance, at all events marine policies, which stand upon a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, or with a reckless ignorance whether it was true or untrue. . . . If the misdescription is very gross it may be evidence of fraud. Whether a descriptive statement in a written instrument is a mere representation, or whether it is a substantive part of the contract, is a question of construction which the Court and not the jury must determine. If the Court should come to the conclusion that such a statement by one party was intended to be a substantive part of this contract, and not a mere representation, the often-discussed question may, of course, be raised whether this part of the contract is a condition precedent or only an independent agreement, a breach of which will not justify a repudiation of the contract, but can only be a cause for compensation in damages. In the construction of charter-parties this question has been often raised with reference to stipulations that some future thing should be done or should happen, and has given rise to many nice distinctions. Thus a statement that a vessel is to sail or be ready to receive a cargo on or before a given day has been held to be a condition in *Glaholm v. Hays*, *Oliver v. Fielden*, *Crookewit v. Fletcher*, and *Seeger v. Dutchie*; while a stipulation that she shall sail with all convenient speed or within a reasonable

time to be only an agreement (*Tarrabochia v. Hickie*, *Dimech v. Corlett*, *Cliphsham v. Vertue*). But with respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine established by principle as well as authority appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, *i.e.* a condition on the failure or non-performance of which the other party may, if he be so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it has not been partially executed in his favour. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses its character of a condition, or, to speak more properly, perhaps ceases to be available as a condition, and becomes a warranty in the narrower sense of the word, namely, a stipulation by way of agreement for the breach of which a compensation must be sought in damages. . . . It is plain that the Court must be influenced in the construction, not only by the language of the instrument, but also by the circumstances under which, and the purposes for which, the charter-party was entered into. For instance, if it was made in the time of war, the national character of the vessel is of such importance that a statement of it in a charter-party might properly be regarded as part of the shipowner's contract, and so amounting to a warranty. Whereas the very same statement in the time of peace, being wholly unimportant, might well be construed to be a mere representation. So if it were shown that the charter-party was made for a purpose, such that unless the vessel began her voyage from the port of loading with a cargo on board by a certain time it was manifest that the object of the charter-party would in all probability be frustrated, the Court might properly be led by these circumstances to conclude that a statement as to the locality of the ship, coupled with a stipulation that she should sail with all convenient speed, was a warranty of her then locality. But we feel a difficulty in acceding to the suggestion (see *Dimech v. Corlett*) that a statement of this kind in a charter-party, which may be regarded as a mere representation if the object of the charter-party be still practicable, may be construed as a warranty if that object turns out to be frustrated; because the instrument, it should seem, ought to be construed with reference to the intention of the parties at the time it was made, irrespective of events which may afterwards occur. The Court in some of the cases suggested that neglect or delay on the part of the shipowner to execute his part of the contract might be a breach of such an essential stipulation on his part as to justify the charterer in treating the contract as brought to an end thereby, and in refusing on that account to perform his part of it; and further, that in deciding whether the breach on the shipowner's part was of such an essential stipulation as that described, the Court might advert to the fact whether such breach had frustrated the material object which the charterer had in view (*Freeman v. Taylor*, *Tarrabochia v. Hickie*, *Dimech v. Corlett*). But the Court did not mean to intimate that the frustration of the voyage would convert a stipulation into a condition if it were not originally intended to be one. . . . In most charters, considering winds, markets, and dependent contracts, the time of a ship's arrival to load is an essential fact for the interest of the charterer (*Glaholm v. Hays*, *Ollive v. Booker*)."

There may thus be three kinds of stipulations in charter-parties—first, mere representations, the untruth of which, unless so gross as to be fraudulent, does not affect the contract, *e.g.* descriptions (which are not "words of contract") of the carrying capacity of the ship, for the merchant

is bound under the ordinary form of charter-party to load a full cargo, though the ship's capacity may be greater than that stated in the contract (*Windle v. Barker*, 1856, 25 L. J. Q. B. 351; *Morris v. Levison*, 1876, 1 C. P. D. 155; *S. S. Heathfield Co. v. Rodenacher*, 1896, 1 Com. Cas. 446); while the shipowner in such a case is not liable if the ship cannot carry an amount of cargo corresponding to the capacity of the ship (*Carnegie v. Conner*, 1889, 24 Q. B. D. 145); secondly, collateral agreements; and thirdly, conditions precedent. The difference between these two latter kinds of stipulations is most shortly put by Lord Ellenborough: "The principle of decision in this and other like cases is that unless the non-performance alleged in the breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for breach of which the party injured may be compensated in damages" (*Davidson v. Gwynne*, 1810, 12 East, 389; 11 R. R. 420; and also in *Ritchie v. Atkinson*, 1808, 10 East, 295; 10 R. R. 307).

The practical rule seems to be that every condition precedent is a warranty, but every warranty is not a condition precedent; and a breach of contract which will justify that contract being dissolved will, if not made use of for that purpose, be available as a breach of warranty.

The following have been held to be conditions precedent in charter-parties: a statement as to the position of the ship whether past (*Ollive v. Booker*, 1847, 1 Ex. Rep. 416, "ship sailed three weeks ago"), present (*Dimech v. Corlett*, 1858, 12 Moo. P. C. 199, "ship now at Malta," and *Behn v. Burness*, ante), or future (*Corkling v. Massey*, 1873, L. R. 8 C. P. 395, "ship expected to be at Alexandria about Dec. 15"); a stipulation that the ship shall sail "on or before a certain day" (*Glaholm v. Hays*, 1841, 2 Mac. & G. 257), or "ship to be ready to receive cargo in all May" (*Oliver v. Fielden*, 1849, 4 Ex. Rep. 135). Such a provision is emphasised by a power being given to the charterer to cancel on breach of it (*Seeger v. Duthie*, 1860, 29 L. J. C. P. 253; *Smith v. Dart*, 1884, 14 Q. B. D. 105; *Groves v. Volkart*, 1884, 1 C. & E. 309; *Hick v. Tweedy*, 1890, 63 L. T. 765); and such power of cancellation may be given on the happening of a particular event for which neither party is responsible, e.g. war (*Adamson v. Newcastle S. S. F. I. A.*, 1879, 4 Q. B. D. 462). This cancelling clause (or if there be not one, then the implied right to cancel if the vessel does not arrive in time) is not prevented from coming into effect because the vessel is prevented from doing her part by perils excepted in the charter-party (*Smith v. Dart*, ante; *Crookewit v. Fletcher*, 1857, 1 H. & N. 893; *Van Baggen v. Baines*, 1854, 23 L. J. Ex. 213), though the shipowner's failure to arrive in proper time may be excused thereby. It is an implied condition precedent that the ship shall arrive in time for her contemplated voyage, and if she arrives so late that it is frustrated, the charterer may refuse to load (*Jackson v. Union M. I. C.*, 1874, L. R. 10 C. P. 125, Bramwell, B.), even though by the charter-party the ship is only bound "to proceed with all possible despatch" (which is not a condition precedent); and in a charter-party containing a similar clause, and also a cancelling date, it was held that it was a breach of a condition precedent for the ship to take an intermediate voyage, though she arrived before the cancelling date (*M'Andrew v. Adams*, 1834, 1 Bing. N. C. 29). Under a time charter the ship must be ready as soon as the contract begins, or the charterer may throw up the contract (*Bradford v. Williams*, 1872, L. R. 7 Ex. 259); and thus under a charter for twelve months, the ship not being ready for two months is a breach of a condition precedent (*Tully v. Howling*,

1877, 2 Q. B. D. 182). A statement that a ship is of a particular class, e.g. A1, is a condition precedent (*Ollive v. Booker*, ante, Parke, B.; *Routh v. McMillan*, 1863, 33 L. J. Ex. 38). So is the clause, that "the ship shall be tight, staunch, and strong" (i.e. seaworthy), when she begins her voyage; and thus it has been held under a charter-party that the ship "being tight, staunch, and strong, and every way fitted for the voyage," should load a cargo, one quarter of the freight to be advanced to the owner's agent on the ship having sailed, that a defence was good which stated that the ship was not at the beginning of the voyage, tight, staunch, and strong, and the cargo which she took was thereby lost, and the plaintiff shipowner could not recover his freight, the fitness of the ship on sailing being a condition precedent to the advance of freight being made (*Thompson v. Gillespy*, 1855, 5 El. & Bl. 222); but in the case of a time charter a stipulation that the ship shall be tight and strong for the voyage, and shall be kept so, is not a condition precedent to the recovery of freight after the freighter has taken the ship into his service (*Havelock v. Geddes*, 1809, 10 East, 555; 10 R. R. 380), nor is a covenant in a charter for monthly hire, for three months certain, that "the ship shall be seaworthy during the continuance of the charter," which is broken by the ship being laid up for repair for two months (*Inman S. S. Co. v. Bischoff*, 1882, 7 App. Cas. 670). The vessel's fitness for the cargo agreed to be taken is a condition precedent, and charterer may throw up the contract if this defect is not remedied in a reasonable time (*Stanton v. Richardson*, 1875, 45 L. J. Q. B. 78). The ship's nationality may be a condition precedent (*Reusse v. Meyer*, 1813, 3 Camp. 475) in time of war or under navigation laws; and if a ship is described as a steamer that may be a condition precedent, if, as is usually the case, time is of the essence of the contract (*Fraser v. Telegraph C. C.*, 1872, L. R. 7 Q. B. 566). The charterer's not naming a port of loading is a breach of contract which justifies the shipowner in not carrying out his contract (*Rae v. Hackett*, 1844, 12 Mee. & W. 724). It is also an implied condition of the contract that the ship is in existence; for if she is not, it is at an end (see *Couturier v. Hastie*, 1856, 5 H. L. 673).

On the other hand, the following stipulations have been held not to be conditions precedent, but only collateral agreements: ship to sail with first convoy or first favourable wind (Abbott, p. 310), or "with all convenient speed," or "in a reasonable time" (*Tarrabochia v. Hickie*, ante, 1 Ellock, C. B.); and a deviation under a charter-party containing such words on the ship's voyage to her loading port, which only resulted in a small loss of freight, has been held not to give the freighter the right to refuse to load a cargo (*M'Andrew v. Chapple*, 1866, L. R. 1 C. P. 643). Under a charter-party that a ship having unloaded her outward cargo at St. Thomas, should directly sail for Dominica, where the charterer was to load a homeward cargo, it was held that a plea by the charterer that the ship did not unload her outward cargo at St. Thomas, did not justify him in refusing to load at Dominica (*Ohlsen v. Drummond*, 1785, 4 Doug. 356). A failure to load a full cargo is not a breach of a condition precedent, though the freight is a lump sum, for the master gets freight on what he carries (*Seeger v. Duthie*, ante), and a stipulation "to sail forthwith" is satisfied by the ship sailing without unreasonable delay (*Hudson v. Hill*, 1874, 43 L. J. C. P. 273). The shipowner by agreeing to pay a fixed sum for delay may only entitle the charterer to ascertained damages for any delay, and not to throw up the contract (*Valente v. Gibbs*, 1859, 28 L. J. C. P. 229; *Jones v. Hough*, 1879, 5 Ex. D. 115); and formerly it was a common stipulation that the merchant should pay an agreed sum instead of loading the ship; but this is

not often found now (*Staniforth v. Lyall*, 1830, 7 Bing. 169). The charterer, too, may waive a breach of a condition precedent, and so deprive himself of the right to take advantage of it (*Bentsen v. Taylor*, 1893, 9 T. L. R. 552). A statement of the ship's tonnage if it amount to a guarantee by the shipowner of his vessel's carrying capacity with reference to the contemplated voyage, and the description of the proposed cargo so far as that description is made known to him, is a warranty (*Mackill v. Wright*, 1888, 14 App. Cas. 120, Lord Macnaghten); and so may be a statement of the amount of water which the vessel draws (*The Norway*, 1864, B. & L. 377). But this will not allow the shipowner who has guaranteed the dead-weight capacity of his ship as so many tons, after the charterer has loaded in her as much cargo as she can safely carry, to sue the charterer for the freight on the difference between the guaranteed capacity of the ship and the actual cargo carried (*Rotherfield S. S. Co. v. Tweedie*, ante); while a charterer who has engaged to pay a lump sum for the use and hire of a ship on condition of her taking a cargo of not less than 1000 tons cannot after the voyage is finished refuse to pay on the ground that the actual cargo carried was less than 1000 tons; for even if this were originally a condition precedent, it ceases to be so by his receiving a substantial part of the consideration for his promise to pay freight (*Pust v. Dowie*, 1863, 32 L. J. Q. B. 179). A statement as to a ship's class is a warranty that she is of that class at the time of the contract (*Routh v. M'Millan*, ante); but not that she is entitled to it or will continue to have it (*Hunt v. Osborne*, 1856, 25 L. J. C. P. 209; *French v. Newgass*, 1878, 3 C. P. D. 163); and a charterer who has had to pay extra premiums for insuring the cargo because the ship's actual class was not A1 at Lloyds, as described in the charter-party, can recover them from the shipowner (*Routh v. M'Millan*, ante). A statement that a ship is at a particular port in safety is a warranty, but not one that she is at sea (*Behn v. Burness*, ante; *Conturier v. Hastie*, ante); and a description of a ship as a steamer is a warranty that she shall use steam power for navigation on the voyage (*Fraser v. Telegraph C. C.*, ante). The words "tight, staunch, and strong" in connection with the ship constitute a warranty which applies to the time that she starts for her port of loading, and does not interfere with the implied one of her seaworthiness on sailing thence with her cargo (*Seville Sulphur Co. v. Colville*, 1888, 15 Sess. Ca. 616. See AFFREIGHTMENT).

The clause of excepted perils in the charter-party is only "for the benefit of the master and not of the freighter"; and thus the latter was held not to be excused from loading a cargo by the Russian Government prohibiting his doing so under a charter-party excepting "restraints of princes" (*Blight v. Page*, 1801, 3 Bos. & Pul. 295; 6 R. R. 795 n., Lord Kenyon); unless express words are used which show that it is to be available to the charterers as well as to the shipowners, e.g. "mutually excepted" (*Bruce v. Nicolopoulo*, 1855, 11 Ex. Rep. 129); or such an inference can be gathered from other words in the contract (*Barrie v. Peruvian Corporation*, 1896, 2 Com. Cas. 50). The exception clause applies to the whole time covered by the charter-party; generally some such words as "throughout the voyage" are used, and under these words it has been held that a preliminary voyage to the port of loading is covered (*Barker v. M'Andrew*, 1865, 17 C. B. N. S. 759, Willes, J., explaining the earlier cases), and also the time at the port of loading before the vessel starts or the cargo is all on board (*The Carron Park*, 1890, 15 P. D. 203), but not the time before the vessel enters on the voyage to which the charter-party refers (*Harrison v. Garthorne*, 1872, 26 L. T. 508).



For the effect of the different clauses in the charter-party, see *SO NEAR AS SHE MAY SAFELY GET*; *ALWAYS AFLOAT*; *ALONGSIDE*; *CARGO*; *BILLS OF LADING*; *DEMURRAGE*; *FREIGHT*; and the various exceptions, such as *Act of God*, etc., under their headings in this work.

(e) *Breach of the Contract*.—The contract may be broken by the act of a party to it; either wholly, as by the breach of a condition precedent, or partially by the breach of one of its independent stipulations; or it may be dissolved by its being rendered impossible of performance by either party, or its further prosecution becoming illegal (*Ford v. Cotesworth*, L. R. 5 Q. B. 644; *Cunningham v. Dunn*, 1878, 3 C. P. D. 445; *Esposito v. Bowden*, 1855, 4 El. & Bl. 979, and 7 ditto. 763, Willes, J.; *The Teutonia*, 1872, L. R. 4 P. C. 171). The charter-party may provide what the damages shall be in the case of a breach of contract, as by a penalty clause in the form given above, "penalty for non-performance of this agreement the estimated amount of freight." This clause is commonly found in charter-parties, but in practice has no effect, for it does not limit the amount of damages which may be claimed, nor fix the amount recoverable for a partial breach (*Carver*, 722); though it may represent the agreed damages for failure to perform the contract altogether (*Dimech v. Corlett*, ante), and if a penalty is attached to the failure to perform a particular stipulation in the charter-party, it seems that it will be recoverable in full, irrespective of whether any actual damage be sustained or not (*Sparrow v. Paris*, 1862, 31 L. J. Ex. 137); otherwise the damages recoverable are determined by the ordinary general rules of law, and are the loss actually arising, which could have been in the contemplation of the parties to the contract. Thus where the shipowner makes default in supplying a ship or taking a cargo as agreed, the charterer has been allowed to recover the extra freight and the extra price of goods which he has been consequently obliged to pay (*Featherstone v. Wilkinson*, 1873, L. R. 8 Ex. 122); and where a ship missed her turn for loading by the charterer's default, and then bad weather prevented her loading when she was ready, the shipowner recovered damages for the whole of such detention of his ship (*Jones v. Adamson*, 1875, 1 Ex. D. 60). The party who is damaged by the default of the other is bound to lessen the damage as much as he can; a shipowner cannot claim damages for detention of the ship which he could have avoided by paying a small claim against the owner of goods, and then recovering it from him (*Möller v. Jenks*, 1865, 19 C. B. N. S. 322); and if the charterer does not load a cargo, the master must get other goods in its place (*The Argentino*, 1889, 14 App. Cas. 519); and if the charterer, after failing to supply a cargo at the place agreed upon, proposes to the shipowner to take in a cargo at some other place, guaranteeing a good cargo and payment of extra freight and expenses, the latter must act reasonably in the matter and accede so far as possible to the change proposed, or his damages will be considerably reduced (*Wilson v. Hicks*, 1857, 26 L. J. Ex. 242). The charterer, if the shipowner fails to provide a ship, is justified in procuring another and charging the extra cost to the shipowner, but the substitute must be a reasonable one, and if only a larger vessel is procurable the damages will be the difference between the freights of the original and substituted ships, giving credit for any profit on the increased amount of cargo carried in the latter (*Mitchell v. Kahl*, ante). Substituted freights go to reduce the amount of damages due to the shipowner on a default by the charterer to supply a cargo, and if they are equal to what would have been earned clear of expenses under the charter-party, they may extinguish the damages altogether (*Stanforth v. Lyall*, ante); but benefits indirectly

derived by the shipowner for the breach of contract, and collateral to the contract, are not taken account of as reducing the charterer's liability (see *Jebsen v. E. & W. Indig. Dock Co.*, 1875, L. R. 10 C. P. 300). Similarly, where goods put on board a ship were burnt, and as the charterers refused to fill up the ship with other cargo, the shipowners did so, it was held that the charterers when sued for breach of contract could not take advantage of the freight on the substituted goods to reduce the damages payable by them (*Aitken v. Ernsthausen*, 1893, 10 T. L. R. 256).

The charterer is entitled to recover damages for undue delay on the voyage, causing loss of weight of cargo (e.g. in the case of sugar) and loss of interest on its value; but not a loss owing to a casual fall in the market price of the goods between the time they ought to have arrived and that when they did arrive (*The Parana*, 1876, 1 P. D. 452, and 2 ditto. 118; *The Notting Hill*, 1884, 9 P. D. 105), unless there are special circumstances, e.g. if both parties know that the goods will sell at a better price if they arrive at an earlier time than if they arrive at a later, or they are sent for a particular market (*The Parana*, per Mellish, L. J.). If the goods are lost, the damages recoverable for them are their market value at the port of destination, and not the price for which they have been actually sold there, for "that circumstance is accidental as between the shippers and shipowners," whether it be more or less than the market value. If any of the freight has been prepaid, that is taken into account, and the shipowners can only deduct the unpaid freight from the market value of the goods (*Rodocanachi v. Milburn*, 1886, 18 Q. B. D. 77, Lord Esher); and if the whole freight has been advanced and insured, persons who have bought (c.f.i.) from the charterers can recover as part of the damages the amount of the advanced freight for the benefit of their underwriters (*Dufourcet v. Bishop*, 1886, 18 Q. B. D. 373, Denman, J.; so *The Thyatira*, 1883, 8 P. D. 155). If the charterer bring his action in the Admiralty Division or have it transferred there, he will be entitled to interest on the amount of the damages reckoned from the time that the claim arose (*The Gertrude*, 1888, 13 P. D. 105).

Under the Admiralty Court Act, 1861, a jurisdiction *in rem* as well as *in personam* was given to the Admiralty Court over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship for damage done to the goods . . . by breach of duty or contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales (s. 6). But the words "any claim for any breach of contract," etc., "have relation undoubtedly to the contract in the bill of lading" (*The Piere Superiore*, 1874, L. R. 5 P. C. 491, Sir M. Smith); and (by this statute) "no jurisdiction whatever is given in the case of claims arising out of charter-parties or other agreements for the use and hire of ships" (*ibid.*, *Cargo ex Argos*, 1873, L. R. 5 P. C. 149). Whether the words will cover charter-parties or not, they do not give jurisdiction in a case where the breach of contract is committed before the goods are put on board (*The Dannebrog*, 1874, L. R. 4 Ad. & Ec. 389, Sir R. Phillimore); nor where the action was brought for non-delivery of a cargo of coals on an outward voyage to a foreign port, though a claim for wrongful delivery of the homeward cargo in England was admitted (Dr. Lushington in *The Kasan*, 1863, B. & L. 1). On the other hand, the County Courts (having Admiralty jurisdiction) have a jurisdiction *in rem* over "any claim arising out of any agreement made in relation to the

use or hire of any ship or in relation to the carriage of goods in any ship" (County Courts Admiralty Act, 1869, s. 2); and an action may be there maintained up to a limit of £300 against cargo for, freight, demurrage, and expenses or against the ship for breach in not completing an agreed series of voyages (*Cargo ex Argos*, 1873, L. R. 5 P. C. 134; *The Alina*, 1880, 5 Ex. D. 227); and even brokers who have effected a charter-party may, by using the name of the charterers, recover against the ship for their commissions (*The Nuova Raffaellina*, 1871, L. R. 3 Ad. & Ec. 483). The ship can be proceeded against *in rem* only, it seems, if her owners (whether real or *pro hac vice* only) would be personally liable for the claim (*The Tasmania*, 1888, 13 P. D. 110); but in an action for short delivery on a bill of lading the Court was held to have jurisdiction *in rem* against the ship, though the master, who was a part owner, might be the only owner personally liable (*The Emilien Marie*, 1875, 32 L. T. 435).

[Abbott, *Shipping*; Carver, *Carriage by Sea*; Leggett, *Charter-Parties*; Scrutton, *Charter-Parties*.]

**Chastisement.**—No chastisement is legal unless it is given under authority of a competent Court or by a person having some recognised punitive authority over the person chastised. Chastisement, if incidental and necessary to self-defence, is excused, but not otherwise, except in the cases below stated.

1. Flogging or whipping was an ordinary common law punishment for misdemeanour. It has not been abolished by statute, but is not now imposed as a sentence except on express statutory authority. See WHIPPING.

2. There is a tradition and some dicta that a husband may chastise his wife with a rod no thicker than his little finger. It seems to have originated in inveterate ancient and modern practice; but, like all other forcible modes of exercising marital authority, is now recognised as illegal (*R. v. Jackson* [1891], 1 Q. B. 671), and where husbands are convicted of an aggravated assault on their wives it is cruelty, justifying a judicial separation or a separation order under the Summary Jurisdiction Married Women Act, 1895, 58 & 59 Vict. c. 39.

3. It seems to have been legal at common law to chastise servants, whether bond or free (see *Mauwgridge's case*, 1706, 16 St. Tri. 57); and in an unrepealed Act of 1541 (33 Hen. VIII. c. 12, ss. 6, 12) special exception from the penalties of the Act is given to noblemen and others who happen to strike their servants within a royal palace or residence with hand or fist, or any small staff or stick, for correction and punishment for any offence. But it is not safe to presume that the rule of the common law is still in force as to adult servants, whom the master can discharge for neglect of their duties.

Masters may apparently still chastise apprentices for negligence or disobedience, provided the chastisement is moderate and given by the master himself (*Coombe's case*, 1613, 9 Co. Rep. 76 a; *Hallwell v. Counsell*, 1878, 38 L. T. 176). But if they maliciously do bodily harm to apprentices or servants, or ill-treat them, they are subject to the penalties of 24 & 25 Vict. c. 100, s. 26, and, if the injured person is under sixteen, to those of the Prevention of Cruelty to Children Act, 1894.

4. Parents and guardians, or persons *in loco parentis*, are entitled, notwithstanding the Prevention of Cruelty to Children Act, 1894, 57 & 58 Vict. c. 41, to chastise children with moderation. The occasion must be sufficient, and the implement and punishment must be of a kind suited to

the misdeed for which the correction is inflicted and the age of the child, otherwise the assault cannot be justified. See BATTERY.

And it is not uncommon for a Court to discharge a child charged with an offence, on condition that the parent whips it or lets a police officer whip it (*R. v. Hopley*, 1860, 2 F. & F. 202).

5. Schoolmasters and teachers are entitled to chastise their pupils while under their care and discipline to the same extent as parents, whose delegated authority they are often said to exercise (*Cleary v. Booth* [1893], 1 Q. B. 465). This right is recognised and saved by the Prevention of Cruelty to Children Act, 1894, 57 & 58 Vict. c. 41, s. 24. In the case of Board Schools the authority of the master is subject to the regulations of the School Boards and the Education Department.

6. The poor law authorities, and managers of reformatories and industrial schools have the same power as a parent with respect to punishment, subject to the regulations of the Home Office and the Local Government Board.

7. The master of a ship may inflict reasonable corporal punishment on a seaman for disobedience to reasonable and lawful commands, or for disorderly, riotous, and insolent conduct while the ship is at sea or in a foreign port or river (*The Agincourt*, 1824, 1 Hag. Adm. 271; *Lamb v. Burnett*, 1831, 1 Comp. & J. 291). The punishment, unless the urgency of the case requires it, must be after due inquiry, and must be entered in the ship's log (57 & 58 Vict. c. 60, s. 228), and, if it is submitted, cannot be justified where it is possible to proceed under the discipline sections of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, ss. 220-238).

In all these cases (3. to 7.), if death results from the chastisement, the parent, etc., is guilty of murder or manslaughter if the chastisement is immoderate (*Mawgridge's case*, 1706, J. Kelyng, 119; 16 St. Tri. 57; *R. v. Coude*, 10 Cox, 547; *R. v. Leggett*, C. & P. 191).

8. It is said that churchwardens and other church officers are entitled to whip little boys who play in church. In old-fashioned places they still do so, but the legality of their action is questionable. See BATTERY.

9. Peace officers have no legal authority to chastise anyone except under sentence of a judicial authority. In some districts they are armed with canes or sticks for the benefit of the local youth; but their use of these instruments for chastisement, if beneficial, is not legal.

[For authorities, see Bacon, *Abr.*, tits. "Baron et Feme F," "Master and Servant N"; 1 Hale, P. C. 453, 474; Hawk., P. C. bk. i. c. 29, s. 5; c. 60, s. 24; Fost. *Crown Law*, 262; Macdonell on *Master and Servant*, 32, 33; Kay on *Shipmasters and Seamen*, 2nd ed., s. 542; Eversley, *Domestic Relations*, 2nd ed., 169, 460, 846, 860.]

**Chattels.**—In modern law a man's chattels are equivalent to his personal estate (*q.v.*), that is to say, to the property which would devolve in case of his death, on his executor or administrator *virtute officii* (*Tilley v. Simpson*, 2 T. R. 659, *n.*). The word *chattel* has the same origin as the word *cattle*, the early form of each being *catel*, an adoption of the old Northern French *catel*, derived from the Latin *capitale*, that is, capital or principal stock or property (*New English Dictionary* (Murray), *s.v.* "Cattel" and "Chattel"). In mediæval Latin the word appears as *catallum* (Du Cange, *Gloss.*, *s.v.*); and in the twelfth and thirteenth centuries *catalla* seems to have been used in England to describe a man's *saleable* property—the property of which he could dispose by will, and which was primarily applicable to the discharge

of his debts. Such chattels then principally consisted of moveable and self-moving things, as vessels of gold or silver, precious stones, arms, implements of agriculture, horses, sheep, and oxen (Dial. de Scaccario, ii. xiv., Bract. fo. 60 b). Cattle especially were the typical chattels of mediæval law (see Pollock and Maitland, *Hist. Eng. Law*, ii. 149); and so what was originally most characteristic of chattels was their mobility. But in those same early days there were certain interests in land which were particularly employed as an investment of capital, and were peculiarly exempt from any of the restrictions generally imposed by the early law upon the alienation of land; and in the course of the thirteenth century these things also came to be reckoned among chattels (see Pollock and Maitland, *Hist. Eng. Law*, ii. 115-117). These interests, at the common law, were wardships and terms of years. A wardship was the name for the interest which a lord had in the body and lands of the infant heir of his tenant by knight's service; and this, together with the right of giving the ward in marriage, was especially regarded as a saleable thing and a source of profit to the lord. The like interest of a guardian in socage (*q.v.*) was also called a wardship; but such guardians were by Stat. 52 Hen. III. c. 17 made strictly accountable to their wards for their dealings with the wardship. A term is the interest of one to whom land is given to hold for a *certain* period of time (Bract. fo. 27 a, 207 a).

In the early times of which we are speaking chattels, as a species of property, were contrasted with tenements (*q.v.*), meaning especially in this context free tenements or freeholdings of land; and as chattels were principally moveable goods, this contrast was made as coincident with the division of the property generally into moveable and immoveable things, the anomalous chattel interests in land being for this purpose disregarded (Glanv. x. 6, Stat. 12 Edw. I. c. 8, 10). This contrast gave rise to a leading distinction in English law, the classification of property as lands, tenements, and hereditaments on the one hand, and goods and chattels on the other, goods being a synonym for chattels (Co. Lit. 118 b). These two classes of property were separated not only by their physical attributes of immobility or mobility, but also by a difference in their legal treatment as regards (1) the remedies for dispossession, (2) succession after death, and (3) alienation for debt, and in later times as regards (4) the mode of alienation *inter vivos*. In the case of wrongful dispossession of land, the law awarded specific restitution; which is the reason why lands, tenements, and hereditaments became in modern times identified with real estate or real property, lands having been originally recoverable by real actions, and the word *real* having in this context the sense of capability of specific restitution. In civil actions to recover goods, however, the common law gave no process attaching the goods themselves, and the dispossessed owner had no certainty of obtaining anything but the value of the goods as damages. Hence goods and chattels became afterwards known as personal property; as actions for damages were personal actions. As to succession after death, lands, tenements, and hereditaments (which expression *prima facie* denoted freeholds only) were not, as a rule, devisable by will at common law, and thus inevitably descended on the tenant's death to his heir, that is, his nearest blood-relation ascertained by rules, of which the most prominent preferred males to females in the same degree of relationship, and of males equally near selected the eldest alone. But chattels were always devisable by will at common law; although in early times a man could not will away more than a reasonable part of his goods if he left a wife or child—a restriction abolished in modern English law. And where

a man left a will, the whole of his chattels devolved, in and after Edward the First's reign, on the persons whom he had appointed to be the executors of his will, and were by them applicable first in payment of his debts, and then according to the testator's lawful dispositions thereof. In the case of intestacy, all chattels devolved upon the administrator (appointed at first by the ordinary under Stat. 31 Edw. III. c. 11, afterwards by the Court of Probate, and now by the High Court in the Probate Division), in whose hands they were likewise applicable in payment of debts, the surplus being divisible, after the Statute of Distributions (22 & 23 Car. II. c. 10), between the widow and children or next of kin of the deceased according to rules, by which all persons, whether male or female, standing in the same degree of relationship, share equally. Succession to chattels after death is further distinguished from the succession to lands in that the former is governed by the law of the place where the deceased owner was domiciled, the latter by the law of the place where the land is situate. So that if a domiciled Scotsman or Frenchman die leaving chattels and lands in this country, the succession to his chattels will be regulated by the law of Scotland or France, while his lands will devolve according to English law. Chattels, too, were not only subject to their owner's debts after his death; they were also always liable to be seized to satisfy debts, for which judgment had been obtained in his lifetime. An equal liability was not imposed on lands until the early part of the present century (by Stats. 3 & 4 Will. IV. c. 104; 1 & 2 Vict. c. 110); although lands had long been partially subject to the claims of creditors. As regards alienation *inter vivos*, it seems that, according to the early common law, the same manner of alienation prevailed for chattels as for lands, delivery of possession being essential in either case. But in this particular, the law for goods gradually diverged from the law governing lands. And at the present day, while for lands the common law necessity for delivery of possession has been superseded by the requirement of a deed (under Stat. 8 & 9 Vict. c. 106), tangible moveable goods (which originally were the bulk of chattels) are alienable between living persons in four ways. Of these two retain and two have become free from the requisite of delivery. The former are (1) by gift, and (2) by loan of things to be consumed or spent, as of wine or money; the latter are (3) by deed, and (4) by sale. (The authorities for the above paragraph are collected in Williams on *Real Property*, Intro. Ch. and Pt. I. Ch. i., 18th ed.; Williams on *Personal Property*, Intro. Ch., Pt. I. Ch. ii., and Pt. iii. Chs. iii. and iv., 14th ed.)

The chattel interests in land above described having increased in number and importance, chattels were classified, in and after the fifteenth century, as being chattels real or personal. The name of chattels real was given to those interests in land which were devisable by will and would pass on death to the executor or administrator. The word real in this context also appears to have the sense of capability of specific restitution; as, if the owners of such interests were ousted, they had special remedies by which they could recover possession. The term chattels personal was applied to the moveable goods which formed the original class of chattels, chiefly because they were recoverable by personal actions (see Lit. ss. 281, 319-324, 365, 740; Co. Lit. 118 b, 351, 388 a).

The following things are or were chattels real: (1) a wardship; (2) a term of years; (3) an estate by *elegit*, which is the interest of one who has taken his judgment debtor's lands in execution under the writ of *elegit* given by Stat. 13 Edw. I. c. 18, and holds them till his debt is satisfied out of the profits; (4) a next presentation severed from the advowson (*q. a.*),

the church being full (see *Rennell v. Lincoln*, 1827, 7 Barn. & Cress. 113); (5) an estate by statute merchant (*q.v.*); and (6) an estate by statute staple (*q.v.*). The two last no longer exist.

Chattels personal are divided in law into choses in possession (*q.v.*) and choses in action (*q.v.*). The former comprise the ancient class of chattels—tangible moveable goods; the latter originally denoted rights of action specially regarded with reference to the fruits of the action, that is, the things recoverable therein, these being, in personal actions, debt, damages, and the like. But in modern times the term chose in action has acquired an extended meaning, and has been applied to several forms of property (of an incorporeal nature) unknown to the old common law, as stocks, shares, debentures, and even copyright.

**Cheap Trains.**—Under the Railway Regulation Act, 1844, railway companies were bound to run one cheap train daily each way at fares not exceeding a penny a mile, the cheap trains thus established being popularly known as “parliamentary trains.” The provisions of the Act of 1844 were, however, superseded and repealed by the Cheap Trains Act, 1883, which is now the governing statute upon the subject. That Act abolished railway passenger duty in the case of fares which for a single journey do not exceed the rate of a penny a mile, and modified the duty payable on other fares in urban districts. Further, it invested the Board of Trade with power to compel railway companies to provide adequate accommodation for third-class passengers, and also trains for the benefit of the working classes. Where the Board of Trade have reason to believe either that on a particular railway or system forming a continuous means of communication a due and sufficient proportion of the accommodation provided is not applicable for passengers travelling at fares not exceeding the rate of a penny a mile, *i.e.* third-class passengers, or that proper and sufficient workmen’s trains are not provided for workmen going to and returning from their work at such fares and at such times between 6 P.M. and 8 A.M. as appear to the Board to be reasonable, they may make such inquiry as they think necessary, or they may, if required by any railway company concerned, refer the matter for the decision of the Railway Commissioners. If the result of such an inquiry shows insufficient third-class accommodation or workmen’s trains, the company concerned may be ordered to provide the same; and in the event of a company failing to comply with such an order, it is provided that the Board of Trade shall certify such failure to the Commissioners of Inland Revenue, and after the date of such certificate the company loses the benefit of the Act with regard to the remission of railway passenger duty. A right of appeal is given to a railway company from any order of the Board of Trade requiring the provision of additional third-class accommodation or workmen’s trains, to the Railway Commissioners.

The only reported application under the Act for an order requiring a railway company to provide additional workmen’s trains is *In re Metropolitan Railway Co.*, 1892, 8 Rail. C. 32. In that case the company was ordered to provide two additional trains, and certain fares were reduced; it was pointed out in the same case that a train may none the less be a workmen’s train within the meaning of the Act, although a company runs first and second class along with the third-class carriages.

The Act makes provision also in respect of the fares to be charged by railway companies for the conveyance of Her Majesty’s forces, or of the

police force, when travelling on the public service. On the production of a route duly signed by the proper authority for the conveyance of these forces, railway companies are bound to provide the necessary accommodation on such terms as may be agreed upon by the authorities and the railway companies; or if no terms are agreed upon, the fares, if the number of persons to be conveyed is less than one hundred and fifty, are not to exceed three-fourths of the ordinary single journey fares, and if the number exceeds one hundred and fifty the fares are to be three-fourths of the ordinary fares for the first one hundred and fifty, and for the numbers in excess of one hundred and fifty, one-half fares are to be charged.

**Cheat or Cheating.**—These terms are the early equivalents of what is now in law more usually described as fraud.

1. The civil remedy for any cheat, whether public or private, is by action of deceit, or to rescind any contract or bargain, or to recover any property obtained, by the cheat. See DECEIT; FRAUD.

2. (a) Conspiracy to cheat or defraud is an indictable misdemeanour, whether the cheating is public or private (see *R. v. Wheatley*, 1761, 2 Burr. 1125). It is punishable by imprisonment, with or without hard labour and (or) fine (14 & 15 Vict. c. 100, s. 29); and is triable at Quarter Sessions (5 & 6 Vict. c. 38, s. 1). See CONSPIRACY.

(b) A public cheat is an indictable misdemeanour, punishable in the same way as conspiracy to cheat and defraud (14 & 15 Vict. c. 100, s. 29). There is some controversy among the text writers as to the true definition of a common law cheat from the point of view of criminal justice (cp. Hawk., P. C., bk. i. c. 71, s. 8; 2 East, P. C., c. 18; Russ. on Crimes, 6th ed., 454, 461), and as to the limit to be placed on the criminal liability, by reason of the doctrine of *caveat emptor* (*q.v.*). But, on the balance of the authorities, a public cheat seems to be a successful resort to some illegal and deceitful or fraudulent device (other than a mere falsehood), either (1) to defeat the course of public justice, or (2) to induce the owner of money, goods, or chattels to part with his ownership, and not merely his possession, in them, to his prejudice. Where the possession only is meant to be parted with, the criminal offence in such a case is, if anything, larceny by a trick. A cheat is different from forgery at common law in that the latter offence does not need proof of any prejudice (*Ward's case*, 1726, 2 Stra. 747).

In Russell on Crimes, 6th ed., vol. ii. p. 454–466, many offences are classed under the head cheats, which can equally well be put under other heads of law. These under 1. above would fall under offences against the administration of justice. They include personation of a judicial officer, or of another person, either in a Court of justice, or before a ministerial officer. Personation of BAIL (*q.v.*) is now a felony; personation involving taking an oath is punished as PERJURY (*q.v.*); and personation of a judge, or cheating or rendering false accounts, fall properly under OFFICIAL MISCONDUCT (*q.v.*). Fabrication of evidence for use in an arbitration has been held an offence of this kind (*R. v. Vreones* [1891], 1 Q. B. 360). Of those under the second head, obtaining money, etc., by a cheat, comes near to, but is not the same as, the statutory offence of obtaining money by false pretences (Larceny Act, 1861, ss. 88–70), inasmuch as the statutory offence can be committed by a successful lie, but the common law offence requires something more, *e.g.* the fraudulent use of a device or token to give colour and credit to the concomitant falsehood, whether acted or spoken (*R. v. Wheatley*, 1761, 2 Burr. 1125; *R. v. Lara*, 1796, 6 T. R. 565; *R. v. Vreones* [1891], 1 Q. B. 360).



The common law offence is therefore now included in an indictment only when the pretences to be proved do not fall within the statute, and the devices proveable fall within the common law definition. Cheating at play, which was a common law cheat, is now punishable as obtaining money by (cheating or) false pretences (8 & 9 Vict. c. 109, s. 17; *R. v. Hudson*, 1860, 29 L. J. M. C. 145). Selling as the work of an artist a picture known not to be his, and bearing a forgery of his signature, has been held to be a common law cheat (*R. v. Closs*, 1857, 27 L. J. M. C. 54), but also falls within the Act of 1861; and the Merchandise Marks Act, 1887, 51 & 52 Vict. c. 28 (see TRADE MARKS); and the Fine Arts Copyright Act, 1862, 25 & 26 Vict. c. 68, s. 7 (see COPYRIGHT).

The deliberate sale of unwholesome food is included in Russell on *Crimes* with common law cheats (*Treave's case*, 1796, 2 East, P. C. 821; *R. v. Dixon*, 1814, 4 Camp. 12; 3 M. & S. 11). But the offence should be classed rather under the head NUISANCE (*q.v.*). Liability for prosecution for the offence as a common law misdemeanour is preserved by the Sale of Food and Drugs Act, 1875, 38 & 39 Vict. c. 35, s. 28; and the Public Health Acts, 38 & 39 Vict. c. 55, ss. 116, 119, 341; and 54 & 55 Vict. c. 76, ss. 47, 138, London).

Deliberate sale by false weights, measures, or tokens, or applying false tokens or trade descriptions (1 East, P. C. 194), are also said to be common law cheats, but are now dealt with usually, though not exclusively, under the Weights and Measures Act, 1878, 41 & 42 Vict. c. 49, ss. 25-27, 32, 69, and the Merchandise Marks Act, 1887, 50 & 51 Vict. c. 28.

### **Checkweigher.**—See COAL MINES.

**Chemical Manure.**—The manufacture of chemical manures is liable to cause a nuisance (*q.v.*). It can therefore only be carried on subject to the statutory restrictions affecting offensive trades (see OFFENSIVE TRADES), or those contained in the Alkali Acts (see CHEMICAL PROCESS). Chemical manure works are specifically included in the schedule to the Alkali Works Act, 1881, 44 & 45 Vict. c. 37.

The fraudulent sale of adulterated manures has been dealt with by the Fertilisers and Feeding Stuffs Act, 1893, 56 & 57 Vict. c. 56. Every person who sells, for use as a fertiliser of the soil, not less than a half-hundredweight of any article manufactured in the United Kingdom or imported from abroad, must give the purchaser an invoice, which is to be deemed a warranty. It must state the name of the article, and whether it is artificially compounded or not, and must give the minimum percentage of the nitrogen, soluble and insoluble phosphates and potash it contains (s. 1).

If he fails to give such invoice, or causes or permits it to be false in any material particular, he is liable to a substantial fine (s. 3). The Board of Agriculture (*q.v.*) is to appoint a chief analyst, and every County Council is to appoint a district analyst (s. 4). Every purchaser is entitled to have his purchase analysed by the district analyst, and to receive from him a certificate of the result of his analysis; but if either seller or purchaser objects to this certificate, a sample may be submitted to the chief analyst. The certificate of either analyst is sufficient evidence of the facts therein stated, unless the defendant or person charged requires that the analyst be called as a witness (s. 5). Prosecutions for offences may be instituted by (a) the person aggrieved, (b) a county or borough council, or (c) any board

or association authorised by the Board of Agriculture. There is a right of appeal from magistrates to Quarter Sessions (*q.v.*) (s. 7).

**Chemical Process.**—See also ALKALI WORKS. Chemical works frequently cause nuisances, from the smells or vapours produced in the process of manufacture. As such, they may come within the purview of the common law as to nuisances (see NUISANCE), or of the legislation regulating offensive trades (see OFFENSIVE TRADES). Special legislation has, moreover, been from time to time passed for the purpose of controlling works from which noxious vapours are or may be evolved. The principal Act now in force was passed in 1881 (44 & 45 Vict. c. 37), repealing and consolidating earlier Acts. It was amended and enlarged in 1892 (55 & 56 Vict. c. 30). Under these Acts the Local Government Board have large powers of regulating and supervising chemical processes carried on commercially. The works affected are—(1) alkali works, *i.e.* works in which muriatic acid gas is evolved; (2) sulphuric acid works, *i.e.* works (not being alkali works) in which the manufacture of sulphuric acid is carried on,—these, however, do not include works in which the acid is produced in the process of extracting copper or other metals from ore; (3) other works, a list of which is given in the schedules to the two Acts,—they may be described generally as works from which vapours of sulphur, nitric acid, chlorine, or coal-gas liquor may come, or where chemical manures are made; (4) salt works, in which the extraction of salt from brine is carried on, and cement works, in which aluminous deposits are treated for the purpose of making cement; (5) white lead and other works, liable to injure the workpeople employed rather than the general public, which are regulated under the Factory Acts.

No works coming under any of the first three headings may be carried on unless registered in a register containing the particulars prescribed by the Local Government Board from time to time. (An Order prescribing these was issued January 7, 1882.) The registration must be renewed annually, the certificates running from April 1 in each year. New works established or reopened since 1882 must be certified, before any manufacture or process is commenced in them, and shall not be registered unless furnished with such appliances as are necessary in order to enable the work to be carried on in accordance with such of the requirements of the Act as apply to that work (44 & 45 Vict. c. 37, ss. 11, 12). Works in existence and operation prior to April 1882 are not affected by this last provision.

To secure compliance with the Act, the Local Government Board appoint inspectors (s. 14). They are empowered at all reasonable times during the day or night to enter and inspect any work, examine any process causing the evolution of any noxious or offensive gas, and any apparatus for condensing it or preventing its discharge into the atmosphere, and generally to inquire into all matters and processes which seem necessary or proper for the execution of their duties (s. 16). An additional inspector may be appointed on the request of a sanitary authority, if they undertake to contribute to his salary (s. 19). Fines for offences under the Act are recoverable by action in the County Court, such action to be brought by the inspector within three months after the commission of the offence (s. 22). The owner is liable to pay the fine, unless he proves that he has used due diligence to comply with and enforce execution of the Act, and that the offence was committed by some agent, servant, or workman without his knowledge, consent, or connivance; in which case proceedings may be

taken against such person (s. 25). A sanitary authority may complain to the Local Government Board of any contravention of the Act causing a nuisance to any of the inhabitants of their district (s. 27). No special remedy or means of putting the Act in force is given to an aggrieved (*q.v.*) individual. He can, of course, inform the inspector of anything he deems wrong.

The owner of an alkali work or scheduled work may, with the sanction of the Local Government Board, make special rules for the guidance of workmen employed (*a*) in any process causing the evolution of any noxious or offensive gas, or (*b*) to attend to any apparatus for condensing such gas, or preventing its discharge, or rendering it harmless and inoffensive when discharged; and may annex fines to any violation of such rules. Such fines may be recovered summarily before magistrates (s. 20).

The special conditions for working vary with the different classes of works.

I. Alkali works must be carried on so as to secure the condensation of 95 per cent. of the muriatic gas evolved, and further, strictly to limit the proportion of gas in the vapour or air which escapes into the atmosphere (s. 3). The owner of such work must in addition use the best practicable means of preventing the discharge, or for rendering harmless and inoffensive all noxious or offensive gases evolved in such work (s. 4). The acid must not come in contact with alkali waste or the drainage therefrom, so as to cause a nuisance (s. 5). Alkali waste may not be deposited or discharged anywhere without the best practicable means being used for effectually preventing any nuisance arising therefrom (s. 6).

II. Sulphuric acid works are to be carried on in such a manner as to secure the condensation of the acid gases of sulphur and nitrogen evolved in the process of the manufacture of sulphuric acid, so that not more than the prescribed proportion of acid gas can escape into the atmosphere (s. 8).

III. In the case of any of the scheduled works, the owner must use the best practicable means for preventing the discharge into the atmosphere of all noxious or offensive gases evolved in the works, or for rendering such gases harmless and inoffensive when discharged (s. 9).

Heavy penalties may be imposed for breaches of the above provisions, increasing in amount after the first conviction. A penalty of £5 for each day during which an offence continues may also be imposed in some cases.

IV. In case of salt works and cement works, the Local Government Board may, by provisional order, from time to time require the owners to adopt means for preventing or limiting the discharge or escape into the atmosphere of noxious or offensive gases; and may impose fines for breaches of their orders. Other provisions of the Act relating to scheduled works may also be applied to these works (s. 10). Works in which salt is produced by refining rock-salt are not considered to be salt works for this purpose; the works affected are only those where the salt is dissolved at the place of deposit, and treated as brine (55 & 56 Vict. c. 30, s. 2).

V. Chemical works come under the definition of factories or workshops, as those terms are defined in the Factory Acts (see FACTORIES AND WORKSHOPS). The provisions of those Acts, for the protection of the workpeople employed, accordingly apply. The more important, which seem to require special notice here, are—(1) That in any work where any process is carried out by which any gas, vapour, or other impurity is generated and inhaled by the workers to an injurious extent, a factory inspector may direct a fan or other mechanical means for preventing such inhalation to be provided (41

Vict. c. 16, s. 36; 58 & 59 Vict. c. 37, s. 33). (2) Where the Home Secretary certifies that any process is dangerous or injurious to health, the adoption of special rules or regulations to meet the necessities of the case may be required (54 & 55 Vict. c. 75, s. 8). Such rules may prohibit or limit the employment of any particular class of persons—*e.g.* women—in any process so certified to be dangerous (58 & 59 Vict. c. 37, s. 28). (Special rules have under these powers been issued with reference to many chemical works and processes, such as white lead and arsenic, chemical works, the manufacture of red-orange or yellow lead, etc. (see Redgrave, *Factory Acts*, p. 175).) (3) Where a workman is suffering from lead, phosphorus, or arsenical poisoning, or any other disease occurring in a factory or workshop which the Home Secretary may include in the list, the medical practitioner attending the case must certify the fact to the chief inspector of factories, so that the matter may, if necessary, be fully inquired into (58 & 59 Vict. c. 37, s. 29). (4) Where lead, arsenic, or any other poisonous substance is used, suitable washing conveniences must be provided for the use of the persons employed in any department where such substances are used (*ibid.* s. 30). (5) Children, young persons, and women may not take their meals or remain during meal times in a factory or workshop in which chemicals or artificial manures are manufactured, except in a room used solely for meals (*ibid.* s. 39).

Local sanitary authorities are obliged to provide such sewers as may be necessary for effectually draining their districts (38 & 39 Vict. c. 55, s. 15), and must give facilities for enabling manufacturers to carry into the sewers liquids proceeding from their factories or manufacturing processes: provided that the liquid is not of such a nature as prejudicially to affect (a) the sewers, or (b) the disposal of the sewage matter conveyed along such sewers by sale, application to land, or otherwise, or (c) is not injurious, in a sanitary point of view, from its temperature or otherwise (39 & 40 Vict. c. 75, s. 7). If substances are discharged by separate drains into a sewer, which separately are innocuous but cause a nuisance when combined, they would come within the proviso, and so ought not to be sent into an ordinary sewer (*St. Helens Chemical Co. v. St. Helens Mayor*, 1876, 1 Ex. D. 196). Acid produced in chemical works is pretty sure to cause a nuisance, if it becomes mixed with other substances, and accordingly must not go into the general sewers. The owner of such works may, however, require the sanitary authority to provide and maintain, at his expense, a drain or channel for carrying off the acid produced in such works into the sea, or into any river or watercourse into which it can be carried without contravention of the Rivers Pollution Acts, 44 & 45 Vict. c. 37, s. 5. Under that Act (s. 4) the discharge into any stream of any fresh poisonous, noxious, or polluting liquid proceeding from any factory or manufacturing process is prohibited. But the continued discharge of such liquids along a channel already used or constructed for such purpose in August 1876, is declared to be no offence, provided the best practicable and reasonably available means are used to render harmless the liquid so flowing or carried into the stream. The fact, however, that chemical refuse was already discharged into a channel would not necessarily authorise the construction of a fresh drain connecting with that channel and so increasing the quantity of refuse finding its way into a stream (see *St. Helens Smelting Co. v. Tipping*, 1865, 11 H. L. 642; *A.-G. v. Leeds Corporation*, 1870, L. R. 5 Ch. 583). The right therefore of an owner of chemical works to require a sanitary authority to provide a drain to carry his refuse into a river, can seldom be of any practical use. Such refuse can often be utilised. Where it cannot, it can rarely be lawfully allowed to find its way into any stream or watercourse.

**Chemist.**—*Definition.*—A chemist (as distinguished from an “apothecary,” *q.v.*) is one who sells and prepares drugs prescribed by others; he does not prescribe drugs himself. The Pharmacy Act, 1868, 31 & 32 Vict. c. 121, s. 3, defines “chemists” and “druggists” for the purposes of the Act as all persons who at any time before the passing of the Act have carried on in Great Britain the business of a chemist and druggist, in the keeping of open shop for the compounding of the prescriptions of duly qualified medical practitioners, also all assistants and associates who, before the passing of the Act, shall have been duly registered under or according to the provisions of the Pharmacy Act, 1852, 15 & 16 Vict. c. 56, or under the Act itself (Pharmacy Act, 1868).

*Right to Trade.*—There is no rule of law forbidding anyone to sell drugs, other than drugs containing poisons, so long as he does not describe himself as a chemist, druggist, or pharmacist, or by a similar description. In order to obtain the right to so describe himself, or to sell or keep an open shop for retailing, dispensing, or compounding poisons, it is necessary for a person to obtain registration as a “pharmaceutical chemist” (Ph. Acts, 1852, s. 12; 1868, ss. 1, 15). But the prohibition in these sections does not apply to any legally qualified medical practitioner who, in order to obtain his diploma, has passed an examination in “pharmacy” (Ph. Act, 1869, s. 1); and it does not extend to or interfere with the business of any legally qualified apothecary or member of the Royal Society of Veterinary Surgeons dispensing medicines for animals under his care (Ph. Act, 1869, s. 1); or to the making of or dealing in medicines manufactured under letters patent (*Pharmaceutical Society v. Piper* [1893], 1 Q. B. 686; *Pharmaceutical Society v. Armson* [1894], 2 Q. B. 720), or the business of dealing in poisons wholesale; or the carrying on of the business of a deceased pharmaceutical chemist after his death by his trustee or executor employing a pharmaceutical or registered chemist as an assistant (Ph. Act, 1868, s. 16). A corporation selling poisons by a duly qualified assistant is not subject to penalties under the Acts, because upon their construction the prohibitions above referred to apply only to “persons” who could be registered as chemists (*Pharmaceutical Society v. London and Provincial Supply Association Ltd.*, 1880, 5 App. Cas. 857), but the unregistered assistant of a duly registered employer who sells poisons in the absence of his employer is so subject (*Pharmaceutical Society v. Wheeldon*, 1890, 24 Q. B. D. 683). A drug containing an infinitesimal quantity of a poison is not within the Acts (*Pharmaceutical Society v. Delve* [1894], 1 Q. B. 71).

*Registration.*—The Pharmaceutical Society of Great Britain was incorporated by charter in 1843. The charter was altered and confirmed by the Pharmacy Act, 1852, which forbade the use of the name pharmaceutical chemist by persons who were not registered under it (s. 12). The Pharmacy Act, 1868, introduced the much wider restrictions referred to above, whereby the business of a retail chemist, as well as the name, is practically limited to registered chemists. The Acts contain saving clauses for the protection of persons established in business before their dates, as chemists or as assistants (Ph. Act, 1869).

The council of the society appoint a registrar, who is required to keep the index of pharmaceutical chemists and assistants (Ph. Act, 1852, ss. 4, 5; Ph. Act, 1862, ss. 8–14). He is directed to erase the names of persons who are dead or presumed to be dead (see Ph. Act, 1868, s. 10). His certificate, countersigned by the president or two members of the council, is evidence of registration or non-registration (Ph. Act, 1852, s. 7), and so is the printed annual register (Ph. Act, 1868, s. 13).

The society examines in Latin, botany, materia medica, and in pharmaceutical and general chemistry, but not in medicine, surgery, or midwifery, in order to determine the applicant's qualification for registration as a pharmaceutical chemist or assistant (Ph. Act, 1852, ss. 8, 10). The examiners must be approved by the Privy Council, and the examination may be modified by the by-laws of the society (Ph. Act, 1868, s. 6).

Every person who has obtained a certificate of competent skill and qualification from the examiners has a right to be registered (Ph. Act, 1868, s. 6), and to become an associate of the society (*ibid.* s. 20).

The Privy Council may direct the name of any person convicted of an offence against the Act, which in their opinion renders him unfit to be on the register, to be erased therefrom (Ph. Act, 1868, s. 26). See MEDICAL PRACTITIONER. A member of the medical profession, or person practising under a medical degree or diploma, was not entitled to be registered under the Pharmacy Act, 1852 (s. 11).

*Rights and Duties; Penalties.*—Registration as a chemist and druggist does not authorise the person registered to practise medicine or surgery, or any branch of either (Ph. Act, 1868, s. 16), nor to prescribe drugs as an apothecary (Apothecaries Act, 1815; *The Apothecaries Co. v. Jones* [1893], 1 Q. B. 89; see APOTHECARY).

All registered pharmaceutical chemists, if actually practising, are exempted from serving on juries or inquests (Juries Act, 1870, s. 9 and Sch.).

They must compound the medicines of the British Pharmacopœia (*q.v.*) only according to its formularies (Ph. Act, 1868, s. 15), and in dispensing poisons must comply with the regulations enacted by the Pharmacy Act, 1868, or from time to time prescribed by the Society, with the consent of the Privy Council (Ph. Act, 1868, ss. 1, 15; see sec. 17 and POISON). But the regulations do not apply to any medicine supplied by a legally qualified medical practitioner or apothecary (Ph. Act, 1868, s. 17) to his patient, and dispensed by any person duly registered; provided that such medicine is distinctly labelled with the name and address of the seller, and the ingredients are entered, with the name and address of the person to whom the medicine is sold or delivered, in a book kept by the seller for the purpose (Ph. Act, 1869, s. 3). The sale of a poison to a person who brings to the chemist what purports to be a prescription for it made out by a doctor, and what the chemist *bona fide* believes to be such, is within the exception (*Berry v. Henderson*, 1870, L. R. 5 Q. B. 296). In that case prussic acid and rose water was dispensed as a lotion. And the regulations do not apply to sale for export by wholesale dealers, or sale by such dealers to retail dealers in the ordinary course of wholesale dealing (Ph. Act, 1868, s. 17).

The person who keeps and controls the shop is liable for breaches of the regulations as to poisons, and his name must be put upon the bottle, etc., containing the poison, even where the chemist's part of his business is under the charge of another person who is duly qualified (Ph. Act, 1868, s. 17; *Templeman v. Trafford*, 1881, 8 Q. B. D. 397), and even though the seller be a corporation (see the judgments in the *Pharmaceutical Society v. London and Provincial Supply Association*, *supra*).

For the law relating to the adulteration of drugs, selling drugs not compounded of the ingredients demanded by the purchaser, and false warranties of and labels upon drugs, see ADULTERATION, vol. i. p. 154.

For the breach of the provisions of the Pharmacy Act, 1868, relating to poisons, a penalty of £5, increasing for subsequent offences, and summarily

recoverable, is provided (s. 17). For the breach of the other provisions referred to above, there is a penalty of £5, recoverable by action in the County Court (Ph. Act, 1868, s. 15; Ph. Act, 1852, s. 12), to be paid as the Commissioners of the Treasury direct (Ph. Act, 1852, s. 14). The action cannot be brought after six months from the commission of the offence (*ibid.* s. 13).

It is a misdemeanour to falsify the register, or any certificate of registration, or to obtain registration by fraud (Ph. Act, 1868, s. 14).

**Cheque.**—A cheque is a bill of exchange drawn on a banker payable on demand (Bills of Exchange Act, 1882, s. 73). The provisions of the Act cited, except as otherwise hereafter stated, so far as they are applicable to a bill payable on demand, apply to a cheque (s. 73). See for such provisions, **BILLS OF EXCHANGE**. The numbers below refer to sections of the Act.

1. *Presentment.*—A cheque is never accepted by the banker (drawee), and is only presented to him for payment; but if the banker on whom a cheque is drawn when it is presented for collection by another banker, marks it for payment and the latter is thereby induced to pay his customer the amount or to otherwise change his position, the former would be bound to pay the cheque (see *Robson v. Bennett*, 1810, 2 Taun. 388; 11 R. R. 614; and *Pollard v. Bank of England*, 1871, L. R. 6 Q. B. 623, where the practice of collection by country bankers is stated, and *Warrick v. Rogers*, 1843, 5 Man. & G. 340, where the clearing house practice is stated; see also **CLEARING HOUSE**).

A cheque may be presented for payment at any time before it is barred by the Statute of Limitations (as to which see below, 11.). But where it is not presented within a reasonable time of its issue, and the drawee, or the person on whose account it is drawn, had the right at the time of such presentment (? when such presentment ought to have been made) to have the cheque paid, and suffers actual damage through the delay (*e.g.* by the subsequent failure of the bank), he is discharged to the extent of such damage, *i.e.* to the extent to which he is a creditor of the banker to a larger amount than he would have been had the cheque been paid (74 (1)). What is a reasonable time is determined by the nature of the cheque, usage, and the facts of the case (74 (2)). In general, the cheque should be presented for payment on the next day after its receipt, if it is payable at the place of its receipt, or forwarded for presentment, if it is payable elsewhere (see Chalmers on *Bills of Exchange*, 5th ed., p. 248; *Boddington v. Schlenker*, 1833, 4 Barn. & Adol. 752; *Prideaux v. Criddle*, 1869, L. R. 4 Q. B. 455; *Heywood v. Pickering*, 1874, L. R. 9 Q. B. 428). For the circumstances under which presentment for payment is excused, see **BILLS OF EXCHANGE**, VI. Where, under this rule, the drawer is discharged wholly or in part, the holder of the cheque to the extent of such discharge is substituted as creditor of the banker (74 (3)).

A cheque is not "overdue" after its date is passed so as to affect a holder without notice with any defect of title attaching to it (cp. **BILLS OF EXCHANGE**, IV., *Overdue Bill*). The staleness is only a circumstance which may be evidence of actual notice that something is wrong (*London and County Bank v. Groome*, 1881, 8 Q. B. D. 288).

A banker's duty and authority to pay cheques are determined by countermand of payment, or notice of the customer's death (75), or of a receiving order having been made against the customer (**Bankruptcy Act**, 1883, ss. 9 and 49). A garnishee order, although for less than the

whole of the customer's balance, justifies the banker in refusing payment (*Rogers v. Whiteley* [1892], App. Cas. 118).

2. *Notice of dishonour* (as to which, see **BILLS OF EXCHANGE**, VI.) is practically necessary to charge the drawer of a cheque only where the banker fails, because the reason for non-payment in any other case is almost always want of assets or a countermand of payment (see 50 (2 c)). The giving of the notice need not be deposed to in the affidavit for judgment under Order xiv. (*May v. Chidley* [1894], 1 Q. B. 451).

3. A *post-dated cheque* is practically the same thing as a bill of exchange falling due at the date marked (*Poster v. Muckreth*, 1867, L. R. 2 Ex. 163; Chalmers, p. 34), so that a partner or agent who has authority to draw cheques, but not bills, has no authority to draw post-dated cheques (*ibid.*). The drawer cannot be compelled by the trustee in bankruptcy of the payee to stop payment of such a cheque (*Ex parte Richdale*, 1881, 19 Ch. D. 409). There is nothing to make the post-dating cheques illegal, and whether a post-dated cheque ought to bear an *ad valorem* stamp as a bill or not (see **BILLS OF EXCHANGE**, XIII.) after the date upon it has passed, if it bears a penny stamp, it is admissible in evidence (*Royal Bank of Scotland v. Tottenham* [1894], 2 Q. B. 715).

4. *Crossed Cheque*.—A cheque is "crossed generally" by drawing on its face two parallel transverse lines with or without the words "and company," or an abbreviation thereof; and "crossed specially" by writing the name of a banker across its face. In either case the words "not negotiable" may or may not be added (76). The law as to crossed cheques was introduced by the Crossed Cheques Act, 1876, and is now found in secs. 76 to 82 of the Bills of Exchange Act, 1882.

The drawer or the holder of a cheque may cross it generally or specially, if it is uncrossed, or cross it specially, if it is already crossed generally; and where a cheque is crossed, the holder may add "not negotiable" (77). The banker to whom a cheque is crossed specially may again cross it specially to another banker for collection, and the banker to whom a cheque which is either uncrossed or crossed generally is sent for collection may cross it specially to himself (77 (5) (6)).

The crossing is a material part, and must not be obliterated or (except as above stated) added to or altered (78).

The duty of a banker on whom a crossed cheque is drawn is to pay it only to a banker, or, if it is crossed specially, to the banker indicated or his agent for collection. If it is crossed specially to more than one banker (except when so crossed to a banker and his agent for collection), he should refuse payment (79). He is liable to the true owner for any loss such owner may suffer by payment being otherwise made. But if the crossing is not apparent, or has been obliterated, or added to or altered otherwise than as authorised by the Act, and the banker pay in good faith and without negligence, he incurs no liability (79).

And if a banker in like manner collect a cheque crossed generally, or specially to himself, for a customer (*Matthiessen v. London and County Bank*, 1879, 5 C. P. D. 7), who has no title, or a defective title, he is not liable to pay the proceeds to the true owner, "by reason only of having received payment" (82). In *Kleinwort v. Comptoir D'Escompte de Paris* [1894], 2 Q. B. 157, the defendants were held liable for the proceeds of a crossed cheque stolen from the plaintiff, which they had collected and paid over to the thief. The section was not, however, discussed, and does not appear to have applied, as the crossing was obliterated, and the thief is not stated to have been the defendants' customer.



Placing the proceeds of a cheque to a customer's account is "receipt of payment" for the customer within sec. 82 of the Bills of Exchange Act, 1882, even though the account is overdrawn (*Clarke v. London and County Bank*, 1897, W. N. 1897, p. 31).

If the banker on whom a crossed cheque is drawn pays it in good faith and without negligence as required by the Act (see above and 79), he is in the same position as if he had paid the true owner, and so also is the drawer, provided the cheque had come into the payee's hands (80) (see *Payment to an Agent*, below, 9.).

5. *Not Negotiable*.—The effect of this addition to a crossed cheque is that any taker of the cheque has not and cannot give a better title than the person from whom he took it had (81). Crossing a cheque to the payee's account is not sufficient to render it not negotiable (*National Bank v. Silke* [1891], 1 Q. B. 435).

6. *Banker*.—A banker to whom a cheque is given for collection is a holder for value as soon as he has carried the cheque to the customer's account. He may then sue upon it as a holder in due course (*M'Lean v. Clydesdale Bank*, 1883, 9 App. Cas. 95; *London and County Bank v. Groome*, 1881, 8 Q. B. D. 288), and if the cheque has been specially indorsed and sent to him, although it is stolen in the post, and he has not credited his customer with it, he can sue a wrongdoer for the proceeds of it (*Kleinwort v. Comptoir D'Escompte de Paris* [1894], 2 Q. B. 157). If he pay a cheque by mistake, he cannot revoke the payment (*Chambers v. Miller*, 1862, 13 C. B. N. S. 125), or recover from a payee or a holder who has honestly received the money (*Pollard v. Bank of England*, 1871, L. R. 6 Q. B. 623), but he can recover from a payee who has fraudulently concealed the insolvency of the drawer from whom the banker expected funds to recoup his payment (*Martin v. Morgan*, 1819, Moore, 635; 21 R. R. 603), or from an agent for collection who has not altered his position (as by paying over to his principal) (*Pollard v. Bank of England*, *supra*). See further on this point, BANK NOTE; and generally, as to a banker's position and duties, BANKER AND CUSTOMER, and above, 4.

7. *Dishonoured Cheque*.—If a cheque is dishonoured the taker can sue the drawer upon the consideration he gave for it (*Rogers v. Langford*, 1833, 1 C. & M. 637; *Woodland v. Fear*, 1857, 7 El. & Bl. 519), unless the transaction was a sale of the cheque for what it was worth (*l.c.*).

8. *Payment by Cheque*.—Giving and taking a cheque is presumably payment only if the cheque is honoured (*Bridges v. Garrett*, 1870, L. R. 5 C. P. 451. See ACCORD AND SATISFACTION). It suspends the right of action for the debt until the cheque has been presented and dishonoured (*Charles v. Blackwell*, 1877, 2 C. P. D. 151), or is stopped by the debtor before presentment (*Cohen v. Hale*, 1878, 3 Q. B. D. 371) (cp. *Palmer v. Bramley* [1895], 2 Q. B. 405, where it was held that a bill of exchange being given for rent, this was evidence of an agreement not to distrain till it fell due).

9. *Payment to an Agent*.—An agent who is not expressly or by the custom of his business authorised to accept a cheque instead of cash, is liable to his principal for any damage caused by taking a cheque which is dishonoured (*Papé v. Westacott* [1894], 1 Q. B. 272). For instance, a rent collector who thus loses the right to distrain (*l.c.*), or a solicitor or agent for sale who parts with possession of the property sold, or the title-deeds, except against cash, may incur such liability (*Blumberg v. Life Interest, etc., Corporation*, 1896, W. N. 176). If payment is made by cheque to an agent who has authority to receive it, and he cashes the cheque and embezzles the proceeds, the payer is discharged (*Charles v. Blackwell*, 1877,

2 C. P. D. 151); so also, if the agent's banker collects the cheque and retains the proceeds against the agent's overdraft (*Bridges v. Garrett*, 1870, L. R. 5 C. P. 451). But if the agent has no such authority—*e.g.* if he is a mere clerk, or a salesman who sells over the counter for cash—the payer is not discharged unless the agent's principal receives the money (*l.c.*, and *Kay v. Brett*, 1850, 5 Ex. Rep. 269).

10. *Donatio Mortis Causâ*.—A gift *mortis causâ* of the donor's cheque is void unless the cheque is cashed, or presented for payment (*Bromley v. Brunton*, 1868, L. R. 6 Eq. 275), during the donor's lifetime, or is negotiated for value to a third person (*Rolls v. Pearce*, 1877, 5 Ch. D. 730), even though the donor's pass-book is given with the cheque (*In re Beak's Estate*, 1872, L. R. 13 Eq. 489), because death is a revocation of the authority to pay (*Herritt v. Kaye*, 1868, L. R. 6 Eq. 198). But such a gift of some other person's cheque is good, though the cheque be undorsed (*Clement v. Cheeseman*, 1884, 27 Ch. D. 631). The gift of a deposit note upon which there is a cheque form, intended for use in drawing out the money deposited, may be a good *donatio mortis causâ* (*In re Dillon*, 1890, 44 Ch. D. 76).

11. *Limitation*.—The right of action on a cheque is barred after six years from dishonour, or when it ought to have been presented, or when presentment was excused (*In re Bethel*, 1887, 44 Ch. D. 561).

[Byles on *Bills*, Chalmers on *Bills of Exchange*, and Willis on *Negotiable Instruments*.]



## Supplemental Notes.



































